CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 47

AL WILLIAMS AND AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., PETITIONERS,

vs.

MICHAEL J. FANNING, INDIVIDUALLY AND AS POSTMASTER OF THE CITY OF LOS ANGELES, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 1, 1947.

CERTIORARI GRANTED APRIL 14, 1947.

No. 11317

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AL WILLIAMS and AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., a corporation,

Appellants,

vs.

MICHAEL J. FANNING, Individually and as Postmaster of the City of Los Angeles, California,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the Southern District of California

Central Division

Civil No. 5043 P. H.

AL WILLIAMS and AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., a corporation,

Plaintiffs,

vs.

MICHAEL J. FANNING, Individually and as Postmaster of the City of Los Angeles, California,

Defendant.

COMPLAINT

(To Vacate a Post Office Fraud Order and for Injunctive Relief Upon the Ground of the Unconstitutionality of a Statute and Upon Other Grounds)

Come now plaintiffs above named and each of them and complain of defendants, as follows:

I.

Jurisdiction is based upon the provision of U. S. C. A., Title 28, Section 41 (6), and is founded upon an action arising under the Postal Laws of the United States, to wit: The so-called Postal Fraud Order Statute U. S. C. A., Title 39, Section 259 [2] R. S., Section 3929; September 29, 1890, c. 908, Section 2, 26 Stat. 466, as amended, and hereinafter referred to as "the Statute."

II.

Jurisdiction is also based upon the provisions of U. S. C. A., Title 28, Section 41 (2), in that a punishment

has been inflicted upon the plaintiffs in excess of that which could be justified or permitted after conviction of the commission of a crime or offense cognizable under the authority of the United States, and in that the right of immunity of which the plaintiffs claim to have been deprived is one of personal liberty not capable of pecuniary valuation and not dependent for its existence upon the infringement of plaintiffs' rights.

III.

The object and purpose of this suit is to vacate a Post Office Fraud Order purported to have been issued under the provisions of the Statute, and to enjoin the Postmaster of the City of Los Angeles, California, from withholding mail addressed to either of the plaintiffs or to Al Williams, Health Conditioner, Al Williams, Physical Conditioner, Al Williams Health System, The Al Williams Health System, or Williams Health System, and particularly from stamping upon all such mail the word "Fraudulent" and returning such mail to the senders, upon the ground among others, that such order and such statute are violative of the plaintiffs' constitutional rights under the provisions of Article I, Section 9, Clause 3 of the Constitution of the United States, and of the First, Fourth, Sixth, Seventh and Eighth Amendments thereto, and that they constitute an attempt to take the plaintiffs' liberty and property without due process of law, in violation of the Fifth Amendment of said Constitution, and to deprive plaintiffs of the equal protection of the laws and of the privileges and immunities of citizens of [3] the United States.

IV.

The constitutionality of the said Postal Fraud Order Statute is attacked upon grounds which it is believed

have never been presented, to wit, that it is a bill of attainder and a branding statute which inflicts cruel and unusual punishment without judicial process or trial, and that the Post Office Department has inflicted and claims to be permitted to inflict, without a judicial trial, a punishment upon plaintiffs exceeding that which would be permitted had the plaintiffs been convicted of the commission of a felony in conformity with law.

V.

Portions of the Statute which are applicable to this action are as follows:

> "The Postmaster General may, UPON EVIDENCE SATISFACTORY TO HIM that any person or company is engaged in conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct Postmasters at any Post Office to which registered letters or any letters or mail matter arrive directed to any such person or company * * * to return all such mail matter to the Post Office to which it was originally mailed, WITH THE WORD 'FRAUDULENT' PLAINLY WRITTEN OR STAMPED UPON THE OUTSIDE THEREOF, AND ALL SUCH MAIL MATTER SO RETURNED TO SUCH POSTMASTERS SHALL BE BY THEM RETURNED TO THE WRITERS THEREOF * * *" (Emphasis added.)

VI.

The Statute is unconstitutional and clearly beyond the constitutional powers of the Postmaster General, for the reason, among others, that it provides a cruel and in-

human punishment, [4] in that it puts it within the power of the Postmaster General to order to be stamped upon all letters mailed to a supposed violator of the statute from any part of the world, by any person, for any purpose or upon any subject, and without restriction as to duration of time, the word "fraudulent," and to return all such letters to the sender thereof, thereby in effect causing such supposed violator to bear a brand publicly designating him as a cheat and a fraud during the remainder of his life, or during the arbitrary discretion of the Post Office Department, and thereby depriving him of his good name and reputation which he may have established and jealously guarded throughout many years of honorable business dealings and which is presumed to be his most valuable asset, by way of punishment which would seem to be greater and more severe than any penalty provided by the United States statutes upon conviction of a criminal offense, including the using of the mails to promote frauds.

VII.

The Statute is unconstitutional further in that it is in fact a bill of attainder statute, which is not alone aimed at denying the use of the mails, but inflicts such cruel and unusual punishment, not after arrest and arraignment, and not by means of a hearing before a judicial tribunal, in which the plaintiff's civil rights are protected, including his right to the presumption of innocence and his right to a trial by jury and appeal, but at a hearing held upon notice by mail at a point 3,000 miles distant from his place of residence, before a mere administrative agency and in a proceeding in which the prosecutor and the persons deciding the issue and who

make the findings of fact and recommendation for such order are disqualified by reason of interest, they being employees of the agency which is prosecuting the proceeding and being each dependent upon such agency for their remuneration and continued employment, and their findings [5] of fact, if supported by any evidence at all, whether or not it consists solely of mere expressions of opinion upon which witnesses differ and whether credible or not, so long as it is satisfactory to them, being claimed by them to be final and conclusive and not subject to appeal to or review by any court.

VIII.

The plaintiffs are informed and believe, and upon such grounds allege that such fraud orders under the provisions of said Statute are uniformly signed by the Postmaster General ex parte and as a mere matter of routine when and as such orders are recommended by the subordinates designated by him to conduct such hearings.

IX.

The Statute is further unconstitutional in that there is no reason or necessity for such a proceeding to be had before the agency which is itself prosecutor or for a citizen of the United States to be deprived of his good name and reputation, or liberty and property, in such a summary, un-American, and un-democratic manner, for the reason that it would be entirely feasible and practicable to require the Post Office Department to prosecute such a proceeding before an impartial judicial tribunal, to wit, a United States District Court of the district in which the accused and the local Postmaster reside and, if the Statute were amended to so provide, there would be imposed thereby no undue hardship upon the Post

Office Department or upon the Postmaster General and no injury whatsoever would be caused to the public welfare, and the Statute would then provide a much needed protection against the abuse of civil rights and liberties, of which the facts involved in this case constitute an example.

X.

That at all times material to this action the defendant [6] has been and now is the Postmaster in charge of the United States Post Office in the City of Los Angeles, California, and a resident and citizen of said state; that as such Postmaster he has the exclusive management of the Post Office in said city and of the receipt and distribution of all mail matter received at said City of Los Angeles through the medium of the United States mails.

XI.

That plaintiff Al Williams Health System of Los Angeles, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, and that said corporation is not, and never was, an officer or agent of or for plaintiff Al Williams or Al Williams, Health Conditioner, or Al Williams, Physical Conditioner, or Al Williams Health System or Williams Health System; and said corporation does not now have nor has it ever had any interest or participation whatever in any reducing plan or program or in any other business which is sold or conducted by use of the mails to any extent whatever. That plaintiff Al Williams is and for many years has been a resident and taxpayer of said City of Los Angeles; that in 1906 he became interested in athletics, and boxed and wrestled as a professional until 1916, when he became an instructor of the wrest-

ling team at the Olympic Club in San Francisco; that at the beginning of World War I he originated a system of rifle disarming for self-defense purposes and went to Washington, D. C. and gave a demonstration before the War College and was sent to Ft. Sills, Oklahoma, School of Arms, and from there went to Camp Borden, Georgia, and from there to the Presidio in San Francisco, when the war ended and he resigned to go into the work of conditioning business and professional men, applying the system he introduced into the Army. That he opened his first establishment in San Francisco in 1920, and then one in Oakland, one in Pasadena, and three in Los Angeles up to 1931, and during [7] the depression years he has been located in one establishment at 541 South Spring Street in the City of Los Angeles. That at one time plaintiffs' organization numbered about 250 employees, and they conditioned over 50,000 business and professional men and are still so operating at the said address. That plaintiff Al Williams sudied weight reduction from the time he became a professional athlete and had much actual experience in the conditioning of boxers and wrestlers, and that he has by this experience learned how to decrease the weight and increase the energy by the use of selective foods and nutrition. That he first became interested in concentrated nutrition in 1935, and he has revised the eating schedule of at least 50,000 individuals, and finally sought to devise a means of eliminating the hunger feeling and desire to overeat, and in that year he began to experiment with concentrated food formulas and their effect upon his own body as well as upon many others, and thereby gained practical knowledge and experience concerning the concentrated food tables hereinafter referred to and which are a part of his reducing

plan or program; that his only Post Office address is in said city and , except for the acts of the United States Post Office Department hereinafter set forth, said plaintiff has enjoyed a reputation for honesty and integrity of a high order wherever his name is known.

XII.

That since the year 1935 plaintiff Al Williams has engaged in the business of reducing those who are overweight, by means of said reducing plan or program, which consists of prescribed diets, exercise, the taking with fruit juice, milk, soup or water, of certain concentrated food tablets which are hereinafter referred to as "said tablets" and which are composed only of about seventeen vegetable concentrates, for the purpose of taking away hunger and the desire to overeat, and also the use of a [8] Special Body Massage Creme to tighten the skin and help correct flabby, fat tissue caused by the loss of weight.

XIII.

That the said business is not an unlawful one and said plaintiff has received and now has at least 2,000 testimonial letters attesting to the efficacy of the plan where other methods have failed of results, and attesting to the truth of all of the representations, pretenses and promises made by said plaintiff, and plaintiffs have never made any false or fraudulent representation, pretense or promise with regard to the said plan or program or said tablets or massage creme, of any kind or character whatsoever, and that no complaint of any kind has ever been made by any user or purchaser of said tablets or creme or of plaintiff's said reducing plan or program.

XIV.

That plaintiff Al Williams is the sole owner and proprietor of said business, which is located in said City of Los Angeles, California, and that a substantial part of said business has been conducted by him through and by the use of the United States mails in sending letters to and receiving letters from persons in interstate commerce throughout the United States and plaintiffs have been and are also receiving from various persons throughout the United States and elsewhere letters upon social and business subjects not connected in any manner with the aforesaid business.

XV.

That on the 25th day of May, 1945, the Post Office Department filed and mailed to the plaintiffs a so-called memorandum recommending the issuance of a show cause order against the plaintiff Al Williams and against the other respondents therein, Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams [9] Health System; and Williams Health System, in which said Department charged as follows:

"Said party and concerns are obtaining and attempting to obtain various remittances of money through the mails from divers persons for tablets called "Foods That Take Hunger Away" together with "Al Williams Weight Reducing Plan" and for a "Special Body Massage Creme" upon pretenses, representations and promises contained in advertisements and in written and printed matter sent through the mails to the effect:

That obese persons will lose weight easily and safely through us of the said plan regardless of the

number of pounds they are overweight or of their age or failure to reduce by other methods;

That the said plan does not include a "strict diet";

That said tablets contain foods which eliminate hunger, and that the taking of these tablets in connection with the said plan will prevent the users from becoming hungry;

That a few days' use of the said plan and tablets will result in the user's loss of his desire to overeat and cause him to "feel full of pep and have more energy";

That said "Special Body Massage Creme" will eliminate "flabby flesh" caused by the loss of weight; and

That the said "Creme" will "beautify the contour of the throat, bust and upper arms, calves of legs and thighs";"

XVI.

Together with said memorandum, the Post Office Department mailed to plaintiffs on said date a letter in the form of an order to show cause, designating said memorandum as a "Specification of Charges" and informing the plaintiffs that such charges would be taken up for disposition on the 20th day [10] of June, 1945, at 10 o'clock a. m. at Washington, D. C., under the provisions of Sections 259 and 732 of Title 39 of the United States Code.

XVII.

That plaintiffs filed an answer to said charges and attended said hearing with their counsel, and that a copy of the transcript of the proceedings at said hearing,

which includes a copy of said answer, is hereto attached, marked "Exhibit A" and made a part hereof.

XVIII.

That there was and is no substantial evidence in fact adduced at said hearing in support of any of said charges, and said charges were and are wholly unsupported by any substantial evidence of any fraud in fact.

XIX.

That all the evidence adduced at said hearing with regard to the representations, pretenses and promises made by the plaintiffs came through the testimony of Inspector John W. Davis and appears on pages 13 to 44, both inclusive, of the transcript of said hearing (Exhibit A attached hereto), and that all such representations, pretenses and promises are true and have been made by plaintiff Al Williams to those who have used said reducing program.

XX.

That the charges against respondents at said hearing before the Post Office Department that they represented, pretended, or promised that the Creme used in their reducing program "will eliminate flabby flesh,"; "that the taking of said tablets in connection with said plan will prevent the users from becoming hungry"; and "that the said plan does not include a strict diet" are wholly without proof of any kind adduced at said hearing, and said charges were and are wholly unsupported [11] by any evidence whatever, although proof was adduced at said hearing that plaintiffs represented, and they did represent, that said Creme, WHEN USED AS DIRECTED, would "help correct flabby, fat tissues"; "acts as an astringent to take up the flabby flesh"; "tighten the skin,"

would "firm the skin as the fat nielts away," and "tends to tighten the skin so that those pounds you lose won't leave 'sags' where extra pounds used to be" and would "beautify the contour of the throat, bust and upper arms, calves of legs and thighs"; that said tablets, WHEN TAKEN AS DIRECTED, would "help to take hunger away"; that the users "will not crave to overeat and will feel full of pep and have more energy" and without them will "become too hungry, tired and nervous to stay with a low caloric diet long enough to lose weight" and that said foods or tablets would WHEN TAKEN AS DIRECTED, "take hunger away"; that the said reducing plan did not include "starvation" or "canary bird diets," and that all of said representations so made are true, and that the contents of all of the exhibits which embody any and all of said representations, promises and pretenses are summed up in the testimony of the said witness, Inspector Davis of the Post Office Department.

XXI.

That the element of fraud or fraudulent intent is entirely lacking from the representations, pretenses and promises made by the plaintiff Al Williams, and said plaintiff has always attempted to conduct an honest and legitimate business and to give value received, as is evidenced by the statements appearing on page 27 of said "Exhibit A" as follows:

"Q. What is the purpose of the Special Massage Creme?

A. This Creme acts as an astringent to take up the flabby flesh. Please understand that the Creme itself does not cause you to lose weight. I don't know of any [12] creme which will do that. But I

> have found astringents very valuable to firm the skin as the fat melts away. When used with massage it tends to tighten the skin so that those pounds you lose won't leave 'sags' where extra pounds used to be. This Creme is pleasant to use, and is readily absorbed,"

and that there was no proof whatever adduced at said fraud hearing tending to establish a fraudulent intent in making any of said representations, either by inference or otherwise.

XXII.

That all of the representations appearing on pages 16 to 39, both inclusive, of said "Exhibit A" are true; that plaintiff Al Williams has made the same representations to the public generally over a period of about 10 years and has applied his reducing plan in approximately 50,000 individual cases without one word of complaint from any of them, and he has received during the said period of time over 2,000 voluntary and unsolicited testimonial letters attesting to the truth of said representations and claims and to the efficacy of said reducing program, a few of which letters he sought to introduce in evidence at said hearing (Exhibit A, pp. 134 to 142, inclusive, and page 190).

XXIII.

That the Post Office Department committed errors of law at said hearing and gross violations of the rights of respondents therein, in the following particulars, viz:

(1) In an attempt to prove that the representations made by plaintiff Al Williams were not true, the Post Office Department introduced at said hearing and relied solely upon the testimony of Dr. Lawrence E. Putnam,

who was interned in Massachusetts hospitals from 1934 to 1938, was assigned to the Civilian Conservation Corps in 1938-39; was a medical officer for the [13] Veterans' Administration in 1939-41, and has since been with the Food and Drug Administration, where his duties include the examination of labels to determine whether or not they comply with the various sections of the Food, Drugs and Cosmetics Act and who practiced privately not exceeding three months and in the District of Columbia during evening hours and week-ends since 1942 (Exhibit A, pp. 59-63).

The testimony of Dr. Putnam consisted only of mere expressions of opinion on which witnesses and medical doctors might and do differ in their conclusions, and that no part of his testimony amounts to actual or substantial evidence of fraud, but said witness admitted that the question of whether or not the said tables would "take hunger away" may be reduced to one of fact, in the following words, viz:

> "The Witness. I would say that testimonial had no value and I can tell you why it has no value. An individual who takes two tablets with a glass of soup or a glass of fruit juice or a glass of buttermilk or skim milk and then has disappearance of hunger pains does not know whether the hunger pains disappeared due to the effect of the tables or to the effect of the juice or milk or soup that went with it, or to both. He doesn't know anything. All he knows is that the hunger pains went away, if they did. To

determine whether or not the hunger pains were eliminated, if they were, by the tablets, one would have to set up a control experiment and a scientifically controlled experiment can be done in any laboratory by the use of a kymograph that I mentioned and the balloon in the stomach and so on. One could really find out the effect of the various things that are put into the stomach on hunger contractions that way." (Emphasis added.) (Ex. A, pp. 117-118.) [14]

The question whether the plaintiff Al Williams should be branded a fraud for an indefinite period and his business and reputation completely destroyed rested solely upon the expression of opinion of this one doctor with limited practical experience, who testified as follows: (Exhibit A, pp. 71-73, inclusive)

"Mr. Mindel. Doctor, do you consider the information requested in the self-analysis chart which is sent out by the respondent sufficient upon which to prescribe a treatment for all of these people?

"Mr. Lawson. I object to that on the same ground, your Honor.

"Assistant Solicitor. Well, I don't think it comes under the same ground because that is to the particular means that the respondent has for getting the information that was read into the record, and he asked the question, as I understood him, as to whether the information obtained through the responses to that questionnaire would give a medical man sufficient information about a patient to give him proper treatment. Was that your question?

"Mr. Mindel. Yes, sir.

"Mr. Lawson. And yet it may not be sufficient for a physician but that wouldn't necessarily have any bearing upon the particular issue. I might state very frankly that this is a surprise to me to have the case tried on the theory as to whether or not we were selling the preparation and plan here involved in such a manner that would comply with medical standards. I don't so understand the law. And I don't think that there is sufficient information here to put us on notice that that was the theory of the Government in this case.

"Mr. Mindel. Well, the word 'safely' appears in the first charge and that word certainly is clear in its [15] meaning, and only a doctor can tell as to whether or not a particular regimen of conduct for an individual is safe for his health.

"Mr. Lawson. Well, we are being measured here, Mr. Solicitor, by medical standards and we have not been charged in that capacity. That is the objection that I make.

"Assistant Solicitor. Well, understand me, Mr. Lawson, we don't hold here in the Department that medical standards in the sense of a practicing physician must be followed. We don't have any right legally to take the position that treatment couldn't be sold through the mails, but we do have the right under the Statute—the Postmaster General has the right—to determine by hearing medical testimony whether the representations are true or false. Now, the Government says that the respondent is representing that this treatment, that this plan, will cause one to lose weight 'easily' and 'safely'. Now, I don't

know whether your literature so represents until I give it the most careful examination. Let's suppose that it does represent that it can be safely taken with no limitation as to physical condition or anything of the kind and that that representation turns out to be false according to medical testimony. Then that is the basis for a fraud order."

It appears to be the position of the Post Office Department that the only way for obese persons to reduce safely is to employ a doctor, and the real complaint against plaintiff Al Williams, when boiled down, seems to be that he is not a doctor, and that doctors are not included in his reducing program. (Exhibit A, pp. 67-75, inclusive.)

The complaint that plaintiff is not a doctor becomes more apparent and persistent when the witness Dr. Putnam testifies concerning his claim of inadequacy of the information [16] questionnaire used and sent out by plaintiff. The information sought by plaintiff in that questionnaire includes: (1) height, (2) weight, (3) greatest and lowest weight in last 10 years, (4) age, (5) waist measurement, (6) hip and bust measurements, (7) nationality, (8) occupation, (9) can you exercise? (10) use tobacco? (11) use liquor? (12) use soft drinks? (13) use laxatives? (14) elimination good? (15) any operations? (Exhibit A, p. 28.) The witness Dr. Putnam states that a doctor would require the following necessary information, viz: (1) age, (2) sex, (3) occupation, (4) history of diseases, (5) family situation, (6) laboratory tests, (7) income. (Exhibit A, pp. 28 and 67.) Yet this key witness maintains that the questionnaire used by plaintiff Al Williams is inadequate to determine whether or not it is safe for the individual to reduce (Exhibit A,

p. 73), although the information sought by plaintiff is more extensive and illuminating, but evidences no interest in the income.

(2) That at least two other medical doctors are diametrically opposed to the opinions expressed by Dr. Putnam in his testimony, and express the opinion that the representations made by plaintiff with regard to said tablets are true; appears by affidavits which are hereinafter set forth and which were filed by plaintiff with the Post Office Department on or about August 10, 1945, in support of a motion to reopen the case for the purpose of taking and receiving in evidence the depositions of Doctors of Medicine who are familiar with said reducing program and whom plaintiff Al Williams was unable to produce at said hearing for the reason that said witnesses resided in Los Angeles, California, and could not go to Washington, D. C. because of the great demands upon them professionally at that time, as well as the difficulties presented by war-time transportation; that plaintiff was not aware that the issues would depend to any [17] extent upon opinion evidence and he was unacquainted in Washington at the time of said hearing and unable to produce any expert evidence in support of said representations.

That by the denial of said motion to reopen said case for the reception of further expert testimony, the Post Office Department closed a very reasonable avenue to the truth and denied respondents therein the right to establish their defense to said charges, which right has been denied them by reason of the arbitrary, peculiar and unreasonable procedure of the Post Office Department in requiring them to defend themselves with medical tes-

timony 3,000 miles from their place of residence and from their acquaintance with medical practitioners.

(3) The Post Office Department further deprived respondents therein of a fair hearing and committed gross prejudicial error at said hearing in permitting the witness Dr. Putnam to testify (Exhibit A, pp. 75-78, inclusive), as follows:

"Mr. Mindel. I stated that in 2-C respondent writes that—well, these are his exact words, (reading):

"'Letters which tell of 10-pound losses in 3 days, 35-pound losses in 30 days, 73-pounds in six months. I assure you that these cases are not rare exceptions.'

I say are there some obese persons who would be harmed by such a rapid loss of weight?

"Mr. Lawson. Just a moment. I object to that. It is not a competent question as related to the particular statement in Exhibit 2-C. The question involved there is as to whether or not that specific representation is true or false, and I don't know what particular charge that is related to in the memorandum of charges.

"Mr. Mindel. It is under safety, Mr. Lawson.

"Mr. Lawson. Under the first one?

"Mr. Mindel. Yes, sir. We are still dealing with [18] safety.

"Mr. Lawson. Well, I still submit that the question does not relate to the specific representation made here. And if he were asked to decide that question it would still be incompetent because the conclusion of the witness is certainly not based upon any evidence before the court.

"Assistant Solicitor. Except the representation in the literature.

"Mr. Lawson. The fact that it was made. Its truth or falsity, there's certainly no basis for his opinion because it doesn't show that he made any examination of the customers.

"Mr. Mindel. Well, for the purposes of the question I assume that we can accept the respondent's representation. He is making that representation and he is saying that it is safe. We are not adding anything to it except to question the doctor as to whether such a loss would be safe.

"Assistant Solicitor. The first question is whether that representation is true or false. Whether it would accomplish that. If it will accomplish that, then would it be safe. I am not inclined to sustain the objection because of that question of the safety of the respondent's treatment for anyone and it is advertised to the public generally. It is definitely an issue under the first charge and he avers that can be accomplished. That is not in issue. It isn't charged that is false but he is asserting that can be accomplished by this treatment. So, asserting that, then isn't the question competent whether that would be safe when he asserts that that much can be taken off by his treatment? The truth or falsity of that statement is not an issue here but the respondent asserts that can be done and I think for that reason it would be [19] competent. I will be glad to hear you on it further, Mr. Lawson.

"Mr. Lawson. I don't know as I could add anything to it except that this witness has testified as a physician—and I am not quarreling with his quali-

fications in expressing an opinion—but he has stated as a physician and as any physician would testify that there should be an individual examination in each case. That is medical treatment. Now, there isn't any proof here as to just what may have been done in the particular cases involved here, that is, as to the particular persons who purchased these tablets, unless we indulge in the assumption that the sale was not properly made under proper information. It is just jumping from a conclusion that because it wasn't scientifically, let us say, administered or sold that it wouldn't be safe. That is the vice of this whole testimony in my judgment.

"Assistant Solicitor. No, he is offering for sale a treatment through the mails which is advertised as being capable of effecting rapid reduction in weight, and it is charged in the memorandum of charges that the respondent also advertises that such rapid reducing may be accomplished safely. Therefore, there is an issue of whether such rapid reduction can be accomplished safely. So for that reason I think it is entirely competent. For the reasons I have stated I am so ruling.

"Mr. Mindel. Will you answer the question Doctor. Are there some obese persons who would be harmed by such a rapid loss of weight?

"The Witness. Yes, there are. As I have explained before, the patient with the previous tuberculosis may become ill. A patient who had diabetes, for example, [20] might be thrown into acidosis by sharp reduction in diet, which would bring about combustion of his own fat and in an improper manner so that the fat gave rise to acetone bodies or

acid bodies in the urine and the patient would be thrown into acidosis, which is a serious condition."

There is no evidence of the condition of the persons referred to in respondents' advertising and respondents therein did not offer to sell their reducing plan to anyone who would purchase it but sought to secure proper information from each purchaser in order to determine whether or not they could SAFELY follow the program. The testimony of Dr. Putnam that there are SOME obese persons who would be harmed by such a loss of weight was entirely incompetent, immaterial and irrelevant to the issues involved, though it might not have been so had evidence been introduced at the hearing to the effect that plaintiff had offered and sold the reducing program to everyone, regardless of their physical condition and history. The evidence is quite to the contrary. Neither was there any evidence that the persons referred to in the representation had either tuberculosis or diabetes.

(4) That the Post Office Department committed prejudicial error and arbitrarily deprived plaintiff Al Williams of a fair and impartial hearing in refusing to permit him to testify at said hearing with regard to his experience with said tablets and the results of his use of them, extending over a period of several years, during which he experimented with them upon himself and many others, his testimony appearing (Exhibit A, pp. 126-130, inclusive), as follows:

"Q. When did you first become interested in concentrated nutrition?

"A. About 1935. At that particular time concentrated nutrition came to the fore, just gradually,

and it was [21] brought to my attention by newspaper items. It seemed to appeal to me because there always had been a problem to keep the discipline of eating among the clients. When we make a revision of food analysis, of which I have made over 50,000, they give me their habits of eating and then when we make the changes there was always a hardship for them to follow the change because of the hunger feeling and desire. So when concentrated nutrition came into vogue the particular thing that inspired me most was that I read an article in the paper that a local chemist there had devised a tablet for Captain Byrd to go to the South Pole or North Pole, I forget which one now, and the notice said it would not require so much space. That kind of made me inquisitive about concentrated nutrition so I looked up some of the people who at that time were in that particular business and I began to experiment myself with concentrated food formulas. Oh, I experimented for on myself personally, on my own body, probably about two years, from 1935 to 1937, with amazing results. I go on fasts. In fact, I went on a fast one time for thirteen days by only taking the tablets in water and I played two games of handball at the end of the thirteenth day. That proved to me that there was some value to the tablets. Then I experimented with the tablets by eating one meal a day and then the tablets. Then again two meals a day and the tablets. Over the period of time I derived conclusive proof within myself that there was a good deal of value to concentrated nutrition. And I experimented in my own family. In fact, my mother-in-law who at the time she was sixty-eight

years of age had lost all the desire to walk or do anything of that type so I changed her food plan and made her eat some of those tablets and amazing as it may seem she got [22]. some of her energy back, some of her ambition, and now even to this day she goes downtown at seventy-eight.

"Mr. Mindel. I object to that sort of testimony, Mr. Solicitor, where Mr. Williams is trying to testify as to the effects of these tablets upon his mother-in-law or anyone else. He has not qualified as a medical expert and certainly he can't testify as to what effects were brought about by these tablets in their use.

"Mr. Lawson. That goes to the weight, Mr.—

"The Witness. (Interposing) I was experimenting then.

"Mr. Mindel. I understand. But certainly Mr. Williams is not by any means qualified as a medical expert to testify upon the efficacy of any preparation.

"Mr. Lawson. He is not testifying as a medical expert.

"Mr. Mindel. He has stated as his conclusion that his mother-in-law by the use of these tables had a revived energy; that she was lethargic prior thereto but when she used these tablets she had surprising new energy, and that certainly is a conclusion which he is unqualified to make.

"Assistant Solicitor. Mr. Lawson, here in the Department we have testimonials offered in these cases by the operators of various businesses selling medical preparations through the mails, testimonials to prove anything,—I mean that will assert anything

about any medicine that is put on the market—and if we consider them of no value whatever in the place of medical testimony they would be of no value in the record, and there was a recent case here in the District of Columbia where the court held that we properly refused to admit testimonials. Well, isn't the testimony of a lay witness just the same as to the effect of any medicine or concentrated foods? [23]

"Mr. Lawson. Not in my opinion if it is the result of direct experience by one who is qualified in the general field of health conditioning. I don't know if a physician could be considered in some cases. I have no particular reference here of course, but there are some medical men whose field would be entirely apart from anything connected with physical activity and the effect of foods and exercise upon the human body than perhaps one who had large experience in the particular field might be more qualified. The matter of expert opinion—the admissibility of that testimony has been widened lately and the only question will be the weight to be attached to it. That's up to the trial court or whoever sits in judgment on it. But that's the general trend I would think of all of the decisions. I am not so familiar with those decisions naturally as you are, but I think in some of the circuits they are accepted; testimonial letters are accepted in the absence of proof that they are not false.

"Assistant Solicitor. Well, it has been an invariable rule here since I have been here in the Department—I have felt that way about it—that testimonials can be of no value because they are testifying to the efficacy of some drug or some tablet

or some plan for the treatment of a physical condition about which the layman knows nothing. Take an arthritic for example, he will give a testimonial that he is much improved, he has taken such and such a preparation. The medical testimony will show that the symptoms of arthritis come and go. That's rather an extreme example. He doesn't know if the preparation had any effect whatever. Nature might have taken care of the situation. We stray from the testimony of those qualified in the field of science. In this case we consider caloric [24] values and what caloric values in food there must be to sustain one. I think the Doctor has already testified that the diet is a reducing diet. I don't think there is any question about that being a reducing diet. But when you come down to a scientific question as to the food value of these tablets I cannot conceive though that he would be qualified to testify concerning them, as to their efficacy. I have heard a good many cases since I have been here on the question of those who are competent to give such testimony, who are qualified. I don't want to be arbitrary about this matter but if you have got any authorities that show me to be wrong about this I will be very happy to hear them. But we frequently have this very situation where the respondent has read a few medical books and attempted to evaluate the statements made in them and we say to give an opinion on a medical question he must be qualified to give such opinion, have a scientific background. So at least nothing yet has been said by the witness or offered to qualify him as an expert medical witness and this is certainly a medical ques-

tion. I will be glad to hear from you further on the subject.

"Mr. Lawson. Well, I assume that it will be merely a matter of weight rather than admissibility. If that is your ruling, why, that's that.

"Assistant Solicitor. That is my invariable ruling here, Mr. Lawson. If I relaxed the rule in your case I would have to relax it in all but that is my invariable ruling about laymen testifying concerning medical questions. Now, you have the same opportunity as the Government has—any respondent has—to introduce medical testimony and it is frequently introduced here. That isn't denied you. But we can't accept an unqualified statement from an unqualified [25] witness concerning such matters.

"Mr. Lawson. Well, all I can say is that with the time at our disposal I doubt very much whether we would have time to get medical opinion."

The refusal to permit the witness Williams to so testify was a violation of a well recognized exception to the rule as to expert witnesses, which exception permits a witness possessed of special training and experience to testify to his opinion when it will tend to aid in reaching a correct conclusion. The witness possessed valuable information derived from actual experience with the tablets over a long period of time, during which he had been in the business of conditioning men, which includes the important subject of weight reduction, and he was eminently qualified to supply expert and pertinent testimony.

(5) Plaintiff Al Williams and the other respondents before the Post Office Department were not charged with practicing medicine without a license but are virtually condemned because they are not doctors of medicine and are offering a reducing program which they have chosen through actual experience and application over a period of many years. See the following testimony of Dr. Putnam in Exhibit A, pp. 107-108:

"Q. Now, as I understand your testimony, you believe that anybody who may be obese should first consult a physician if he desired treatment. Is that your position?

"A. I think that is the sensible thing to do.

"Q. Well, you say sensible thing, you think that should be done, don't you?

"A. I certainly think that we should be sensible.

"Q. And you do not believe that any treatment without the advice of a physician is a proper treatment?

"Mr. Mindel. I object to the generality of the question. I think it should be made specific with regard [26] to obesity.

"Mr. Lawson. Well let us understand—

"The Witness. (Interposing) I was just about to ask you whether you meant treatment for obesity.

"Mr. Lawson. Yes. We will restrict it to that because that is what we are interested in.

"The Witness. As I said before, the sensible way would be to have medical supervision."

(6) That the key witness for the Post Office Department admitted (Exhibit A, p. 119) that the plaintiff's

principal representation was true, in the following testimony, viz:

"Q. If the tablets, Doctor, were taken as it is indicated that they may be with water, what effect would that have in dispelling hunger pains?

"A. Practically none.

"Q. You have indicated that there is a possibility or I believe you have, that if one takes these tablets with fruit juice or buttermilk or the others the hunger pains might disappear.

"A. Yes, they may.

"Q. Is that a temporary effect or is that a lsting effect.

"A. Or course it is temporary."

The instructions given by respondents in said proceedings for the taking of said tablets appears on page 36, Exhibit A, as follows:

"Take 1 tablet before breakfast, 2 at noon, and 2 tablets before dinner. Any time during the day when you feel hunger take 1 or 2 tables (not to exceed 10 tables). DON'T chew the tablets. Swallow them with one-half glass of fruit juice, skim milk, or if it is a cold day take with hot soup or bro If at work and you cannot have [27] the fruit juice, take them with water. The day that you are exclusively on the Food Tablets, take 2 or 3 tablets during the day when hungry. Take tablets with water, fruit juice, soup or skim or buttermilk. When following a 2 meal day food plan, go every 4th day taking only the food tables. When following a 3 meal day food plan, go every 3rd day taking only the concentrated Food Tablets."

XXIV.

That on December 10, 1945, the Postmaster General and said Post Office Department nevertheless made an order in words and figures as follows:

"POST OFFICE DEPARTMENT
WASHINGTON

Order No. 29990 Dec 10 1945

"It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that AL WILLIAMS; AL WILLIAMS, HEALTH CONDITIONER; AL WILLIAMS, PHYSICAL CONDITIONER; AL WILLIAMS HEALTH SYSTEM; THE AL WILLIAMS HEALTH SYSTEM, and WILLIAMS HEALTH SYSTEM, and their officers and agents as such, at Los Angeles, California, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of sections 259 and 732 of title 39, United States Code, said evidence being more fully described in the memorandum of the Solicitor, for the Post Office Department of the date of December 6, 1945, and by authority vested in the Postmaster General by said laws the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said party & concerns and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and [28] that the amount thereof will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the Department.

"And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said party & concerns to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the words 'Fraudulent: Mail to this address returned by order of Postmaster General' plainly written or stamped upon the outside of such letters or matter. Where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed to send such letters and matter to the appropriate dead letter branch with the words 'Fraudulent: Mail to this address returned by order of Postmaster General' plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

(Case No. 44237-F)

(Signed) J. M. Donaldson
Acting Postmaster General.

To the Postmaster.
Los Angeles, California."

And said order was received by the defendant on December 12, 1945, and a copy thereof was received by plaintiffs on December 17, 1945.

XXV.

That by reason of being unsupported by any substantial evidence in fact, and by reason of the facts herein alleged, said order is void and issued without and beyond the authority and jurisdiction of the Postmaster General, and of said Post Office Department, and beyond the

authority conferred upon them [29] by the Acts of Congress.

XXVI.

That Exhibit A hereto attached and the aforesaid order constitute the whole of the record of said proceedings before the Post Office Department except certain exhibits which are unimportant to this action, and said order is based only on said record and upon a memorandum embodying findings of fact made by Vincent M. Miles, as "Solicitor" of said Department, a copy of which findings of fact is hereto attached as "Exhibit B" and made a part hereof.

XXVII.

That there was no credible or substantial evidence produced or presented at said hearing in support of the alleged finding that plaintiffs are or were at any time engaged in obtaining money through the mails by means of false and fraudulent pretenses, representations or promises, or that plaintiffs are or were engaged in any fraudulent conduct or representation of any kind or character whatsoever, or that plaintiffs had any intent to defraud, as alleged in said charges, or at all.

XXVIII.

That said findings of fact do not support said order and do not in fact find any fact establishing or tending to establish that plaintiffs at any time were engaged in any unlawful business or that plaintiffs or either of them were engaged in making any false or fraudulent representation, pretense or promise of any kind or character or that plaintiffs or either of them had any fraudulent intent, but said findings and said record upon their face establish that the plaintiff Al Williams was at all times

engaged in a lawful and highly legitimate business which has brought substantial benefit to thousands of individuals without injury to any. [30]

XXIX.

That said record, "Exhibit A"; and said findings of fact, "Exhibit B", affirmatively establish an absolute good faith on the part of the respondents named therein and a complete absence of actual fraud and of any fraudulent intent whatsoever.

XXX.

That plaintiff Al Williams and the other respondents in said proceedings were deprived of a full and impartial hearing and their said rights grossly violated, for the reason that they came to said hearing with no notice or intimation whatever, nor could they fairly be charged with the knowledge, that the issues or any thereof would depend upon the opinion testimony of a medical doctor; that respondents therein were unacquainted in Washington, D. C. and were therefore entirely unable to there present medical testimony and so stated at said hearing. That on or about August 10, 1945, said respondents filed their motion to reopen the case before the Post Office Department in said matter, in order to and for the purpose of taking depositions of Medical Doctors in Los Angeles who would refute all of the material testimony of said witness Dr. Putnam, and said respondents then filed with the Post Office Department, in support of said motion, the affidavits of two Doctors of Medicine, in words and figures as follows:

(Entitled Before the Post Office Department)

"State of California)
) ss.
County of Los Angeles)

"Charles J. Pflueger, being first duly sworn, deposes and says: That he is a Medical Doctor duly licensed to practice in the State of California and practicing in the City of Los Angeles in said State.

"That he is familiar with the reducing plan heretofore used and advertised by Al Williams of said City of Los [31] Angeles and with the tablets which have been used by said Williams in connection with said reducing plan and which said Williams has claimed would take away hunger; that said tablets contain beet leaves, carrot leaves, lettuce, parsley, kelp, celery, asparagas, spinach, watercress, celery seed, rhubarb stock, rhubarb root, brewers yeast, chili powder, escarole, endives, powdered liver, stomach powder, heart muscle, alfalfa, and wheat flour, and that said tablets used in connection with said reducing plan and as heretofore suggested and advertised by said Al Williams will, in the presence of hunger and when one is taken before breakfast, two at noon and two before dinner and at other times during the day until no more than ten have been taken, in the opinion of the affiant, prevent the user from becoming hungry and result in the loss of his desire to overeat and will cause him to feel full of pep and have more energy; that it is the opinion of affiant that obese persons will lose weight easily and safely through the use of said reducing plan, regardless of the number of pounds they are over-

weight or of their age or failure to reduce by other methods; that said reducing plan does not include a strict diet and that, in the opinion of affiant, said tablets used in connection with said plan contain foods which eliminate hunger, and that affiant will so testify under oath at any hearing held in the City of Los Angeles, California, and will then and there give the reasons upon which said opinion is based.

"That it was impossible for affiant to go to Washington, D. C. on June 20, 1945, and it is impossible for affiant to absent himself from the City of Los Angeles for the purpose of traveling to Washington, D. C.

(Signed) CHARLES J. PFLUEGER, M.D. [32]

Subscribed and Sworn to before me this 11th day of August, 1945.

(Seal) GERTRUDE BERG
Notary Public in and for the County of Los Angeles, State of California.
My Com. exp. 1/30/46."

(Entitled Before the Post Office Department)

"State of California)
) ss.
County of Los Angeles)

"M. John Beistel, being first duly sworn, deposes and says: That he is a Medical Doctor duly licensed to practice in the State of California and practicing in the City of Los Angeles in said State.

"That he is entirely familiar with the tablets which have been used by Al Williams of Los An-

geles in connection with his reducing plan and which said Williams has claimed would take hunger away; that said tablets contain beet leaves, carrot leaves, lettuce, parsley, kelp, celery, asparagas, spinach, watercress, celery seed, rhubarb stock, rhubarb root, brewers' yeast, chili powder, heart muscle, escarole, endives, powdered liver, stomach powder, alfalfa, and wheat flour, and that said tablets will, when one is taken before breakfast, two at noon and two before dinner and at other times during the day until no more than ten have been taken, in the opinion of affiant, prevent the user from becoming hungry, and result in the loss of his desire to overeat and will cause him to feel full of pep and have more energy. That, in the opinion of affiant, said tablets contain foods which eliminate hunger, and that affiant will so testify under oath at any hearing held in the City of Los Angeles, California, and will then and [33] there supply the reasons upon which said opinion is based.

"That it was impossible for affiant to go to Washington, D. C. on June 20, 1945, and it is impossible for affiant to absent himself from the City of Los Angeles for the purpose of traveling to Washington, D. C.

(Signed) M. JOHN BEISTEL, M.D.

Subscribed and Sworn to before me this 11th day of August, 1945.

(Seal) GERTRUDE M. BERG

Notary Public in and for the County of Los Angeles, State of California.

My Com. exp. 1/30/46."

But said motion was denied by the Post Office Department upon the alleged ground that the matter had been pending a long time and it had no facilities in the City of Los Angeles for the taking of such depositions, although there is in said city a United States Attorney with a fully equipped and acting office and staff of assistants.

XXXI.

That the Post Office Department further grossly violated the rights of said respondents and deprived them of a fair hearing by conducting said hearing at Washington, D. C., instead of at Los Angeles, California, and by conducting such hearing before itself instead of before a United States District Court, and by grossly violating all of the civil rights of respondents therein, including the right of presumption of innocence and to a trial by jury, and for said reasons and those hereinbefore alleged, the said order is void and of no effect and was issued without substantial evidence in fact and beyond the jurisdiction of the Post Office Department and of the Postmaster General and beyond the authority conferred or intended to be conferred by Congress, and is in violation of respondents' constitutional [34] rights.

XXXII.

That plaintiff Al Williams has been conducting his said business of weight reduction and conditioning of business and professional men for about 25 years, during which time he has revised the eating schedule of at least 50,000 persons and he has not had one complaint of any kind from any of them but has received several thousand voluntary and unsolicited letters of grateful commendation from users of his said reducing plan and program. That plaintiff's said business is highly legitimate and

legal and has always been conducted in accordance with high ethical and moral standards, in which the wide experience of plaintiff Al Williams in physical conditioning and weight reduction has brought great benefit and happiness to many thousands of people.

XXXIII.

That plaintiffs have been branded by the Post Office Department as a fraud, upon the opinion of one doctor that the degree of cessation of hunger pains is in direct proportion to the number of calories put into the stomach (Exhibit A, pp. 116-117), when plaintiffs are informed and believe and upon such information and belief allege that the concensus of opinion of Doctors of Medicine differs widely from such a theory.

XXXIV.

That on or about August 17, 1945, with the desire to be fair and to cooperate with the Post Office Department, plaintiff Al Williams voluntarily consented that his mail should be withheld from delivery at Los Angeles, California, pending the decision of the Post Office Department upon the issues presented at said hearing, and since said date a substantial amount of mail has been received and is being received daily at the Post Office in Los Angeles from various persons throughout the [33] United States, addressed to plaintiff Al Williams and to all of the other respondents in said proceedings in connection with the said business and containing remittances of money orders and currency, and that there has also since been received at said Post Office a substantial number of letters addressed to plaintiffs from places throughout the United States and elsewhere upon social and personal business subjects other than said reducing business; that

mail addressed to plaintiffs or either of them and to the said respondents will continue to be received daily at said Post Office so long as plaintiffs shall continue to live at Los Angeles and so long as their names shall be listed in any directory in said city; that plaintiff Al Williams owns his own home and place of residence and other real property in Los Angeles and desires and expects to reside there during the remainder of his lifetime.

XXXV.

Plaintiffs have, since the making of said order, been informed by the defendant that, pursuant to said order and only by reason thereof, he will deliver no more mail addressed to plaintiff Al Williams or to any other of the five designations named therein, and that since December 12, 1945, all mail addressed to plaintiffs or either of them, and since August 17, 1945, all mail addressed to plaintiff Al Williams and to the other of the respondents in said proceedings before the Post Office Department, has been and plaintiffs fear that it will in the future continue to be stamped upon the face of the envelope "Fraudulent" or "Fraudulent: Mail to this Address returned by Order of Postmaster General," and thereafter returned to the sender in all cases where the address of the sender is contained on the outside of the envelope, and that all other of such mail is being and will be so stamped and sent to the dead letter office of the Post Office Department, and [36] plaintiffs are informed and believe and upon such ground allege that the defend-

ant will continue in the future to so dispose of all mail received hereafter at such Post Office which is either addressed to plaintiffs or either of them or to Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams Health System; Williams Health System, or to plaintiffs under any other designation by which plaintiffs or either of them may be known, although plaintiff Al Williams Health System of Los Angeles, Inc., a corporation, is not named in said fraud order.

That on August 17, 1945, when plaintiff Al Williams voluntarily consented to the withholding of his mail from delivery at the Post Office in Los Angeles, California, until the determination of the Post Office Department as to whether or not a fraud order would be issued, there were being received at said Post Office daily approximately 50 letters addressed to the plaintiff Al Williams and about 450 letters daily addressed to said plaintiff under the other designations set forth in said fraud order.

XXXVI.

That plaintiffs have no plain, speedy or adequate remedy at law and that they will suffer great and irreparable loss and injury unless the defendant is prevented from carrying out his said intentions, in that plaintiffs are and will be and become advertised to the entire world as a cheat and fraud for the reason that any person who may send a letter by mail addressed to plaintiffs or any or either of them by their true or any other designation, including those mentioned in said fraud order, at Los

Angeles, California, with said persons' return address designated thereon, will have said letter returned to him stamped on the face of the envelope thereof the word "Fraudulent" which, in effect, will mean and constitute to all of said [37] persons that plaintiffs are being branded by the United States Government as a fraud and that by said withholding, stamping and returning of the plaintiffs' mail, their good reputation which they have cherished and maintained, to say nothing of said reducing business and the extensive conditioning business of plaintiff The Al Williams Health System of Los Angeles, Inc., which have been built up over a period of many years and are now successfully operated in Los Angeles, will be ruined, and plaintiffs will, by reason of said acts of the Post Office Department, become unable to earn a living or to successfully engage in any business or means of earning a livelihood.

That said order, if continued in existence, will unjustly cause plaintiffs to become despised and shunned personally and in business and that only the immediate issuance of a restraining order, as prayed for herein, will prevent such irreparable injury, for the reason that every day's delay in the issuance of said restraining order will cause and permit plaintiffs to be branded as aforesaid before a great many additional persons and their good name and business will thereby be injured to such additional extent.

Wherefore, plaintiffs pray:

(1) That an order be issued by the Court temporarily restraining defendant from carrying out the said order of the Postmaster General, and that, pending hearing upon the merits of this action, the court issue an order to show cause requiring the defendant to show cause why he should not be enjoined and restrained from carrying out the said order;

(2) That upon trial of this action upon the merits the said order of the Postmaster General be vacated and decreed void and that the defendant be perpetually enjoined from carrying out said order and directed to proceed and continue with the regular [38] delivery of all mail addressed to plaintiffs or to the names designated in said fraud order in the usual and regular course of his duties;

(3) That said sections 259 and 732 be each decreed void and unconstitutional in their entirety, and that plaintiffs be awarded their proper costs and disbursements herein, and such other and further relief as may appear just and equitable.

RICHARD L. NORTH
Attorney for Plaintiffs. [39]

[Verified.] [40]

["EXHIBIT A"]

Before the Solicitor for the Post Office Department
Holding a Fraud Order Hearing
F. & L. Docket
14/381

In the Matter of Charges That
AL WILLIAMS,
AL WILLIAMS, HEALTH CONDITIONER,
AL WILLIAMS, PHYSICIAL CONDITIONER,
AL WILLIAMS HEALTH SYSTEM,
THE AL WILLIAMS HEALTH SYSTEM, and
WILLIAMS HEALTH SYSTEM,

at

Los Angeles, California,

are engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended).

Washington, D. C.
Wednesday, June 20, 1945.

Hearing of the above-entitled matter came on before Honorable Daniel J. Kelly, Assistant Solicitor of the Post Office Department, in the hearing room of the Post Office Department, on Wednesday, June 20, 1945, at 10:15 o'clock a. m. [43]

Appearances:

On behalf of the Post Office Department: Saul J. Mindel, Esq.

On behalf of the respondents: Gordon Lawson, Esq.

PROCEEDINGS

Mr. Mindel. Mr. Solicitor, this is a case involving charges based upon a memorandum of charges directed against Al Williams, Al Williams, Health Conditioner, Al Williams, Physical Conditioner, Al Williams Health System, The Al Williams Health System, and Williams Health System, at Los Angeles, California. "It is charged that the above named party and concerns are engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), which said scheme is in substance and effect as follows:

"Said party and concerns are obtaining and attempting to obtain various remittances of money through the mails from divers persons for tablets called "Foods That Take Hunger Away" together with "Al Williams (weight) Reducing Plan" and for a "Special Body Massage Creme" upon pretenses, representations and promises contained in advertisements and in written and printed matter sent [44] through the mails to the effect;

"That obese persons will lose weight easily and safely through use of the said plan regardless of the number of pounds they are overweight or of their age or failure to reduce by other methods;

"That the said plan does not include a "strict diet";

"That said tablets contain foods which eliminate hunger, and that the taking of these tablets in connection with the said plan will prevent the users from becoming hungry;

"That a few days' use of the said plan and tablets will result in the user's loss of his desire to overeat and cause him to "feel full of pep and have more energy";

"That said "Special Body Massage Creme" will eliminate "flabby flesh" caused by the loss of weight; and

"That the said "Creme will beautify the contour of the throat, bust and upper arms, calves of legs and thighs";

"Whereas, in truth and in fact, said preparations and plan will not and cannot accomplish the results aforesaid, but all of the said pretenses, representations and promises are false and fraudulent;

"I, therefore, recommend that said party and concerns be called upon to show cause why a fraud order should not be issued against them.

And that is signed "William C. O'Brien Attorney." The memorandum is addressed "To the Solicitor, of the Post Office Department."

A copy of the memorandum of charges was forwarded with a [45] letter of citation addressed to the parties indicated on May 25, 1945, and that was sent under cover with a letter to the postmaster at Los Angeles on the same date for delivery to the addressees. The postmaster under date of May 29th, 1945, forwarded a receipt signed by Al Williams acknowledging the delivery of the citation and memorandum of charges, and advising that the average daily mail received by the addressees is as follows: Al Williams, 50 letters; Al Williams, Health Conditioner, 25 letters; Al Williams, Physical Conditioner, 5 letters; Al Williams Health System, 250 letters; The Al Williams Health System, 50 letters; and Williams Health System 25 letters. And it states that

"In addition to above mail is also received addressed to The Williams program, averaging 100 letters per day."

Subsequent to the preparation of this case as indicated by the memorandum of charges, Mr. Solicitor, there was received additional literature in the case from the respondent. As a result of certain representations contained therein an additional charge was prepared and the respondent advised thereof under date of June 18, 1945. I realize that in view of the distances that they did not receive that notice prior to their departure from Los Angeles, and I will hand a copy to the counsel at this time for his information.

That was under date of June 18 when we addressed a letter to Mr. Al Williams and stated (reading)

> This is to advise you that the memorandum of charges dated May 25, 1945, in the case pending before this office and involving charges of misuse of the mails by Al Williams, Al Williams, [46] Health Conditioner, et al., is hereby amended to include the following charge:
>
> > That the said tablets act as a "general tonic" and their use will enable persons who have attained a normal body weight "to remain physically fit."

That letter was sent under cover with a letter to the postmaster at Los Angeles, June 18, for delivery to the respondent.

Mr. Lawson. We would have no objection to the filing of any amendment provided however we are given ample opportunity to prepare for any defense that might be necessary.

Assistant Solicitor. Do I understand you, Mr. Mindel, that you are moving now that the memorandum of charges should be amended to include that additional charge?

Mr. Mindel. That is correct.

Mr. Lawson. I might state—May I ask the formality of address. Do you address you as Mr.—

Assistant Solicitor. Solicitor, ordinarily.

Mr. Lawson. Well, Mr. Solicitor, I had prepared an answer to the charges originally preferred which in part complains of the inadequacy of the charges, that is, their lack of specificness. And I have no particular objection or any intent to postpone or delay this matter unless it be necessary to adequately defeat the charges. From the charges as originally preferred they tell us nothing specific. They are just simply a statement in large part of conclusions arrived at by the general advertising matter and now we are confronted with an additional charge. I don't [47] know where this is going to lead us to but if at the conclusion of the hearing I find it necessary to properly defend this by evidence that we might be able to introduce I am going to ask that the final disposition of the matter be postponed until we have had an opportunity to properly answer.

Assistant Solicitor. Well, Mr. Lawson, we don't like to try these cases piecemeal. If you have any reason now to make application for a continuance of the hearing, why, you are at liberty to make it, but at the outset I want to tell you that we just can't try these hearings piecemeal. In other words, whatever evidence is going to be offered should be ready for hearing now.

Mr. Lawson: Will it be possible to submit any reply by brief?

Assistant Solicitor. Oh, you will have ample opportunity to submit your reply by brief. You will be loaned a copy of the transcript and you will have ample opportunity to do that but as far as evidence is concerned it must be adduced at this hearing.

Mr. Lawson. May I have just a moment?

(Short recess taken)

Mr. Lawson. Mr. Solicitor, we don't recognize that as any part of the literature or advertising used in connection with the tablets, and we have no way of anticipation what this might be and on that ground object to any amendment at this time.

Assistant Solicitor. We will have to wait the return of [48] Mr. Mindel.

Mr. O'Brien. Mr. Mindel just stepped out a minute. He has received some late literature upon the basis of which he told me he had amended the citation.

Assistant Solicitor. Of course the parties didn't receive the amended citation before leaving Los Angeles and—

Mr. O'Brien. No, they didn't.

Assistant Solicitor. —therefore this motion now that the original memorandum of charges be amended to include that—of course, Mr. Lawson, the Government has made charges that you are making representations through the mails as set forth in the memorandum of charges. If the Government fails to sustain those averments of the memorandum of charges—in other words, if your literature or whatever you may be sending through the mails does not prove that you are making those representations then the Government has failed to carry the burden. If they show, if a fair, reasonable

interpretation of the literature show that those representations are made then we have the second issue of whether they are true or false. Now, there are two simple issues: first, does your advertising matter or other matter that you are sending through the mails, circulars, advertising matter in any periodicals, and publications, make those representations; second, if they are made, are they false. Simple issue of facts. And I don't want to put you to any hardship with regard to this last charge if you have come the distance from Los Angeles prepared to meet the other charges. I don't want you to go into the hearing now and have to meet a charge you are not prepared to meet. [49]

It in turn, as far as the first issue is concerned, it in turn is merely a question of interpreting your literature. This amendment would only be a question of interpreting the literature in so far as is concerned the issue of whether you are making those representation, if you make it, you may not be prepared to meet which is the case.

Mr. O'Brien. Mr. Solicitor, if we could go off the record for a minute perhaps I could show counsel the letter from the Al Williams Health System which is the basis of the last amendment I understand.

(Off the record.)

Mr. Lawson. Mr. Solicitor, as to the question as to whether or not the representation was made that we will not quarrrel with because I can see from this letter that such was made. As to its truth or falsity I don't know. It seems to inject a different type of defense than I had in mind.

Mr. Mindel. Well, it is all part of the general scheme, Mr. Solicitor. These respondents of course are familiar

with their scheme and certainly know they make certain claims and therefore when they came to defend they should be prepared to defend the whole scheme.

Assistant Solicitor. Well, of course, Mr. Mindel I don't want any respondent here to be put to the hardship of defending against something of which he had no notice prior to coming into the hearing room. Now, they may be prepared—I don't know what preparation counsel has made but they may be able [50] to defend against the other six charges whereas they are not against the seventh.

Suppose we do this for the time being, Mr. Lawson: let's conditionally allow the amendment and if there is any hardship on you as a result of your being unprepared to present proof on the second issue under that charge I will take care of the situation for you.

Mr. Lawson. And be subject to a motion to strike.

Assistant Solicitor. That is right, sir. Well, let's proceed along those lines then.

(Motion to amend original memorandum of charges allowed conditionally.)

Mr. Mindel. Well, I am stuck right now. My witnesses are missing around the building, Mr. Solicitor.

(Short recess taken.)

Assistant Solicitor. You may read your answer now, Mr. Lawson.

Mr. Lawson. "Answer of Above-Named Parties", referring to the captioned parties in the charges filed. Do you want me to read the names of the parties?

Assistant Solicitor. That isn't necessary.

Mr. Lawson. (Reading):

Al Williams, Al Williams, Health Conditioner, Al Williams, Physical Conditioner, Al Williams Health System, The Al Williams Health System, and Williams Health System, at Los Angeles, California, answering the charges on file herein in the above entitled matter, [51] and hereinafter referred to as respondents, admit, deny, and allege as follows:

1. That the charges preferred are for the most part statements of opinion based upon advertisements, and in written and printed matter employed by respondents over a considerable period of time, and do not fairly apprise respondents of specific charges that they, or either of them, are required to answer at the scheduled hearing on June 20, 1945, and particularly with reference to the advertisements, written and printed matter currently employed by respondents, or either of them.

2. Respondents, and each of them, deny generally and specifically that the preparations and plan therein referred to will not or cannot accomplish the results claimed by respondents in the advertisements, and in written and printed matter employed by respondents relating thereto, and deny that the said alleged pretenses, representations, or promises contained in the specifications of charges on file herein are false or fraudulent.

3. That the value and efficacy of the preparations and plan complained of, and the claims made therefor by respondents are fully demonstrated by the use of said preparations and plan by respondents and the purchasers of said preparations and plan.

That respondent Al Williams has been engaged for approximately forty years in activities relating to health conditioning, and the claims and representations made by him with reference to the preparations and plan in question are based upon that experience, and the results obtained by their use.

From 1906 to 1916, respondent Al Williams was a professional athlete, devoting approximately six years to wrestling and boxing. From 1916 to 1919, he was employed at the Olympic Club in San Francisco, California, in its wrestling department. When World War I started, he was granted a leave of absence from the Olympic Club to test in the United States Army a method of defense of rifle disarming in hand-to-hand fighting. The merit of his system was immediately recognized, and he was sent to Fort Sill, Oklahoma Infantry School of Arms. After a period of time testing the system under the supervision of Major Farris and Major Drumm, he was sent to Camp Borden, Georgia, and then to the Presidio in San Francisco. In the meantime the war came to an end, and he returned to the Olmpic Club.

During the period of three years with the Olympic Club and the United States Army, he acquired a valuable experience in physical exercise, nutrition, water therapy, and adjunct methods, applied by individuals to better physical condition. In 1920, he resigned from the Olympic Club, and opened an establishment in San Francisco for [52] rendering a service of physical conditioning. From 1920 to 1932, his business expanded into branches in Los Angeles, Pasadena, and Oakland, California, with an organization that handled in that period of twelve years

over 50,000 business and professional men. Between 1932 and 1935, his health conditioning business became restricted, because of the then existing depression, to the business operated by him in Los Angeles, which he presently conducts.

During all of the foregoing period of time respondent Al Williams made a close study and analysis of nutrition, and made an extensive research of the relation of food to the reduction of weight. About 80 per cent of his clientele were interested in weight reduction.

During the years, 1935, 1936 and 1937, respondent Al Williams became interested in and made investigation of the value of concentrated nutrition to supplement the bulk of natural foods. He found that foods could be compressed into tablet form, and energy derived therefrom. He first experimented with concentrated nutrition in the form of tablets upon himself and members of his family, and demonstrated the value of concentrated nutrition, which could be used in connection with a plan for the reduction of weight and improvement of general health condition, by supplementing natural foods with concentrated nutrition when a person felt hungry. Respondent's experiments and observations were conducted to 1942 chiefly by the use of tablets of concentrated nutrition by clients of his health establishment. He demonstrated that the use of tablets of the type referred to in the charges contained herein, in connection with and as a part of the nutrition plan and conditioning, obtained the results which he claims and uses in his advertisements, and written and printed matter.

The "Special Body Massage Creme" referred to in the charges contained herein is a cream the efficacy of which has been demonstrated in his health establishments, and by purchasers.

In the time available, respondents have not had an opportunity to compile accurately the number of testimonial letters in proof of the claims of respondents for said preparations and plan, but the number will run into the hundreds. Respondents will make available those letters for any investigation as to the truth of the matter therein stated.

4. The tablets in question are manufactured for respondents by S. O. Barnes & Son, manufacturing pharmacists, 17234 South Main Street, Gardena, California, which is a firm of unquestioned reputation. The formula is composed [53] of concentrated liver, stomach substance, heart substance, brewers' yeast, and the following dehydrated vegetables: beet leaves, carrot leaves, lettuce, parsley, kelp, celery leaf, asparagus, spinach, watercress, celery seed, rhubarb stalk, escarole, endive, alfalfa, and chilli powder.

The dehydrated liver, stomach, and heart substances are obtained from Armour & Co. The brewers' yeast is the especially grown yeast for dietary and medicinal use. The dehydrated vegetables, with the exception of the chilli powder, which is obtained from Chilli Products Co., are manufactured by the California Vegetable Concentrates, Inc. and only first quality vegetables are used in dehydration.

This product is manufactured into tablet form by pharmacists, under the supervision of a pharmaceuti-

cal chemist who is also under the supervision of a Director of Research & Control. The Company maintains its own research and control laboratory.

Respondents in their written and printed matter have at all times truthfully represented the composition of said tablets.

The foregoing is respectfully submitted.

Dated: June 15, 1945.

And it is signed by me as attorney for the respondents and verified by Mr. Al Williams for and on behalf of all the respondents.

Mr. Mindel. At this time all of my witnesses are here and so we may have them sworn and then proceed.

Assistant Solicitor. Well, let all the witnesses stand and be sworn.

(Inspector John W. Davis, Mr. Frank W. Casey, Mr. William V. Eisenberg and Dr. Lawrence E. Putnam were sworn as witnesses for the Post Office Department, and Mr. Al Williams was sworn as a witness for the respondents by a Notary Public of the District of Columbia.)

Mr. Mindel. Mr. Solicitor, I would like to call to the stand Inspector Davis. [54]

Whereupon,

JOHN W. DAVIS,

called as a witness for and in behalf of the Post Office Department and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mindel:

Q. Will you state your full name, please.

A. John W. Davis.

Q. What is your present occupation, Mr. Davis?

A. Post Office Inspector.

Q. How long have you served in that capacity?

A. Since October, 1942.

Q During the course of your official duties did you undertake an investigation of the use of the mails by the respondents in this case? A. I did.

Q. And did part of your investigation consist in the conduct of test correspondence with the respondents?

A. It did.

Q. What was the purpose of your conducting that correspondence with the respondents?

A. For the purpose of determining the manner in which the mails were being used. [55]

Q. And did you base that correspondence, Inspector, upon advertisements of the respondents which came to your attention? A. I did.

Q. I hand you an envelope marked Exhibit No. 1, and ask you if those are the advertisements that you saw. A. They are.

Mr. Mindel. I offer as Exhibit No. 1 the advertisements of the respondents which the Inspector has just identified.

Assistant Solicitor. Any objection, Mr. Lawson?

Mr. Lawson. Those are advertisements that have been employed. There is one question I want to reserve however and I haven't finally determined how good it is and that is as to the time involved. As I understand it from Mr. Williams there was some objection raised by the Food and Drug Administration and corrections were made as a result. And I think that the test should be at least of the advertisements and printed matter that are currently used as at the time the order was issued—

Mr. Mindel. Well, to which particular ones do you object?

Mr. Lawson. Anything predating the first of Jan. 1945, Mr. Mindel. November, 1944, is the correct date.

Mr. Mindel. Well, of course, these are, Mr. Solicitor, representations upon which the products in question were sold regardless of the attitude of the Food and Drug. Furthermore, it is my understanding that the Food and Drug does not censor [56] advertising offered by any drug firm or anyone else selling drugs. That contention of course is a matter of argument here. But these are representations that have been made by the respondent in the sale of this product, and the purpose of course in showing them over a period of time is to show the continuing scheme.

They start, the ones we have here, October 29, 1944, and run down to March 10, 1945.

Assistant Solicitor. You mean those are the dates of the periodicals in which they appeared?

Mr. Mindel. That is correct, yes sir. As a matter of fact, at least one this October 29, 1944, at a glance at least, contains the same representations as the one of March 10, 1945, which you can see upon your examination of it.

Assistant Solicitor. Well, that I don't think is material. Are you making formal objection to the introduction of those advertisements, Mr. Lawson?

Mr. Lawson. Anything prior to November, 1944.

Assistant Solicitor. Well, that would only include the one.

Mr. Lawson. There is a difference which I think counsel will discover on close examination.

Assistant Solicitor. Well, I overrule your objection even to that one because it's for the purpose, as Government counsel stated, to show the continuity of the scheme from that time.

Mr. Mindel. Exhibit 1-A, Mr. Solicitor, is a clipped advertisement from the Pittsburgh Courier of March 10, 1945. [57] It says (reading):

> Reducing CAN BE FUN WITH FOODS THAT TAKE HUNGER AWAY. Try This New Amazing Method! It's simple-easy to follow. No "Canary Diets" or strenuous Exercises.

And then there are two pictures "BEFORE" and "AFTER" of a colored gentleman here who is referred to as Mr. Earnest Whitman of Los Angeles. He says (reading):

> "I had used almost every kind of reducing remedy and to no avail. Then I tried your system and lost 60 lbs. in 3 months. I feel better, sleep better and LOOK YOUNGER."

Both men and women can wave goodbye to 5 to 125 pounds of ugly fat—feel better—LOOK YOUNGER!

Send today for FREE information about the Al Williams Health System with the "FOODS THAT TAKE HUNGER AWAY." No drugs—no medicines—no thyroid method. Not sold in stores. Write TODAY for FREE DATA.

AL WILLIAMS HEALTH SYSTEM, Dept. PC-3
541 South Spring Street, Los Angeles 13 Calif.

Assistant Solicitor. What is the exhibit number of that?

Mr. Mindel. 1-A. Exhibit 1-B is an advertisement clipped from the Newark, New Jersey Star Ledger of March 4, 1945, which is illustrated by a picture of a smiling lady superimposed on another picture of a smiling lady of much larger girth. The advertisement reads:

MEN! WOMEN! Amazing New Way to
LOSE WEIGHT

with Foods That Take Hunger Away! Look younger! Feel Better! If you are overweight SEND NOW for proven plan that has helped thousands from coast to coast shrink 5 to 10 inches around the [58] waist, bust, hips! Get rid of dizziness, shortness of breath, heart palpitation, head and back pains, blood pressure and other symptoms due to excess weight. Send today for FREE information on my proven Reducing Plan with Foods that Take Hunger Away.

No starvation diets. No thyroid or harmful drugs. Not sold in stores. WRITE NOW FOR FREE DATA.

Al Williams Health System

And under the pictures I have referred to it says "Here's Proof: Mrs. Elizabeth Cooper, Los Angeles, lost 103 lbs. in 9 months."

And then Exhibit 1-C is an advertisement from the Mother's Home Life and The Household Guest, issue of February, 1945, the same ad as Exhibit 1-B.

Exhibit 1-D is from the New York Sunday Mirror of November 19, 1944, which has two before and after pictures of Mrs. Lucille Hanson of Los Angeles, and it also says (reading):

> REDUCING CAN BE FUN WITH FOODS THAT TAKE HUNGER AWAY—NEW AMAZING METHOD! LOOK YOUNGER FEEL BETTER
>
> NO MORE "CANARY-BIRD" DIETS OR BACK-BREAKING EXERCISES TO ACHIEVE YOUR DREAM OF ROMANTIC LOVELINESS!
>
> WRITE TODAY!

And then quoting Mrs. Hanson, "READ HOW AL WILLIAMS SHOWED ME HOW TO LOSE 74 POUNDS!" And it then says (reading):

> Men and women wave good-bye to 5 to 125 pounds of ugly fat—wear your clothes better, feel better. Send today for FREE information about reducing with the "FOODS THAT TAKE HUNGER AWAY." No drugs, medicines, thyroid materials. Write today for FREE DATA.
>
> AL WILLIAMS Health System [59]

Exhibit 1-E is an ad in Mother's Home Life and The Household Guest of January, 1945, and is the same as 1-B and 1-C.

Exhibit 1-F is an ad in Mother's Home Life and The Household Guest of November, 1944, which has a small sketch of a silhouette of a nude woman and reads:

MEN! WOMEN! Amazing New Way to
LOSE WEIGHT
with FOODS THAT TAKE HUNGER AWAY!
Want to say "goodbye" to 20 to 70 pounds of ugly fat? Shrink 5 to 10 inches about your hips? Get rid of dizziness, shortness of breath, heart palpitation, head and back pains, blood pressure and other symptoms due to surplus weight? Send today for FREE information about my Proven Reducing Plan with Foods that Take Hunger Away. No starvation diets. No thyroid or harmful drugs. Not sold in stores. Write now. No cost or obligation. Penny postcard will do AL WILLIAMS

Exhibit 1-G is an ad clipped from the New York Sunday Mirror of October 15, 1944, which has side by side the pictures which were contained in 1-B and 1-C superimposed one on the other of Mrs. Elizabeth Cooper. It says (reading):

REDUCING CAN BE FUN with FOODS THAT TAKE HUNGER AWAY
Mrs. E. Cooper, LOST
Los Angeles 103
lbs.
NEW AMAZING METHOD!
No more "canary-bird" diets or Back-Breaking Exercise to Achieve Your Dream of Romantic Loveliness!
WRITE
NOW [60]

Quoting Mrs. Cooper, "READ HOW AL WILLIAMS SHOWED ME HOW TO LOSE 103 POUNDS!" (Reading):

> Want to wave good-bye to 5 to 125 pounds of ugly fat—wear your clothes better, feel better? Send today for FREE information about the Al Williams Health System, with the "FOODS THAT TAKE HUNGER AWAY." No drugs, medicine, and so forth.

Exhibit 1-H is the same as 1-G and 1-H appeared in the Los Angeles Sunday Examiner of October 29, 1944.

(Envelope containing advertisements of Al Williams Health System, marked Government Exhibit No. 1 and sub exhibit numbers, was offered and received in evidence.)

By Mr. Mindel:

Q. You conducted, Inspector, test correspondence under various names with the respondents, did you not?

A. I did.

Q. I hand you an envelope marked Exhibit No. 2, and ask you to identify its contents.

A. Exhibit No. 2 is test correspondence conducted over the name of Harry Sheffield, Box 296, Delta, Utah, dated March 3, 1945, directed to the Al Williams Health System, 541 South Spring Street, Los Angeles, California, and responses to the test correspondence.

Mr. Mindel. I offer in evidence at this time Exhibit No. 2.

Assistant Solicitor. Any objection, Mr. Lawson?

No objection.

Mr. Mindel. Exhibit 2-A, Mr. Solicitor, is a carbon copy of a letter sent over the name Harry Sheffield to the Al Williams [61] Health System and it states (reading):

> I saw recently one of your circulars wherein you say men have lost from 10 to 73 pounds of excess blubber very fast and one man lost 84 lbs. in three months.
>
> They say when the shoe fits, wear it and I am in the 84 pound class. I am 5′ 10½″ 55 yrs. old and weigh 257, so if you can do as much for me let me hear from you.

And that letter was forwarded through the postmaster at Delta, Utah, which was shown as the address of Sheffield.

Exhibit 2-C is a circular received from the Al Williams Health System addressed to "Dear Friend" "Thank you for your inquiry * * *." I don't want to read the whole thing into the record but I would like to read certain pertinent parts.

Mr. Lawson. Could you describe that, Mr. Mindel?

Mr. Mindel. It is a circular on the letterhead of The Al Williams Health System above which is the line "HELP YOURSELF TO HEALTH, VIGOR AND ENDURANCE". Under the line The Al Williams Health System it says "ORGANIC CONDITIONING" and then Hollywood Division, Los Angeles, and Los Angeles, and Los Angeles addresses. It is signed "Cordially yours, Al Williams Health Conditioner,"

Assistant Solicitor. We might explain to Mr. Lawson something about your procedure. When an exhibit is introduced it is introduced of course in its entirety. The

test letters, Mr. Mindel, should be read into the record because the respondent perhaps might not have copies of those. However, circular matter and any printed matter sent through the mails by the respondent [62] we do not copy into the record under the assumption the respondent has copies of those and that when he gets a copy of the record he will not need to have those in the record. However, at this hearing Government counsel or you have the right to read into the record such parts of them to which you wish to call attention, and I assume that is what Mr. Mindel is now doing.

Mr. Mindel. Yes, sir.

Mr. Lawson. I merely wanted a description of the circular so we could identify it.

Assistant Solicitor. I expect that to be done. But I think first, Mr. Mindel, because of the fact that respondent may not or at least readily locate the correspondence of that test name that it should be read into the record first and then describe briefly each exhibit and read such parts of course as you wish.

Mr. Mindel. You want me to read the whole letter, is that what you mean?

Assistant Solicitor. Either that or have Miss Long copy them into the record, because you see the respondent would not have copies of those.

Mr. Mindel. Well, this letter I am about to read is a circular letter of the respondent.

Assistant Solicitor. Well, I would appreciate your reading the test—Well, you have read the test letter.

Mr. Mindel. I have read the test letter.

Assistant Solicitor. The first test letter.

Mr. Mindel. Yes, sir. [63]

Assistant Solicitor. Now, is there any individualized reply?

Mr. Mindel. No, this is apparently mimeographed or multigraphed, one or the other.

Assistant Solicitor. Well, you have described it sufficiently for the purpose of identification.

Mr. Mindel. And the parts I read will more clearly identify it if what I have said hasn't. Will that be all right?

Assistant Solicitor. Yes. Having read, Mr. Lawson, the original test letter into the record I assume that there is nothing else of which you will not have a copy when you receive the transcript.

Mr. Lawson. That is right.

Mr. Mindel. From this Exhibit 2-C I read the following, the second paragraph:

> REDUCING IS MADE EASY, in a SENSIBLE WAY. It is logical that if you cut down the amount of food usually taken, you are bound to reduce. But the problem arises that when you cut down on your food intake, you become hungry, have a craving for more food, and cannot diet without often injuring your health. It is impossible to go very long on a rigid diet. IT IS NOT DIFFICULT TO STAY WITH MY PLAN. It is amazing what you will be able to do when you CHANGE your blood stream with FOODS that bring you down to your normal weight. Not only will you look better, but you will FEEL BETTER, more ANIMATED and MORE VIGOROUS.
>
> READ THE ENCLOSED LITERATURE TELLING OF RESULTS OBTAINED BY OTHERS!

I have hundreds of unsolicited testimonials on file at my office, all showing that my plan is a PROVEN, SCIENTIFIC method which brings QUICK AND LASTING RESULTS. Letters which tell of 10 pound losses in 3 days, 35 pound losses in 30 days, 73 pounds in six months. I assure you that these [64] cases are not rare exceptions. They are more nearly the rule!

The special body massage creme which I have found so effective in reducing programs in my own establishments should be used. I have found this Creme very valuable to firm the skin as the fat melts away. When used it tends to tighten the skin so that those pounds you lose won't leave "sags" where extra pounds used to be. It is also beneficial when used as directed to beautify the controu of the throat, bust and upper arms, calves of legs, and thighs.

And skipping one paragraph, which urges the addressee of this letter to drop in at his office if he desires, we come to the last paragraph (reading):

Let me urge you again to read the descriptive matter carefully. Then if you are REALLY IN EARNEST about wanting to lose weight, as hundreds of other men and women have done, then I know that you will fill in the enclosed Self-Analysis Chart and Order Blank and return it to me in the enclosed envelope—TODAY!

Exhibit 2-C-1 is a printed circular—a folded four-page printed circular—on the front page of which there is a cut of the likeness of Mr. Williams and in red ink

there is printed the following: "Have you Tried Most Everything?" and then in black ink, "Let AL WILLIAMS Nationally Known Conditioner Show You How to" and then in red ink, "*Los* Weight With 'FOODS THAT TAKE HUNGER AWAY'" Then reverting to black ink (reading):

> It is possible that you have tried before to get rid of unwanted fat. Perhaps you have enthusiastically embarked on some kind of "diet" suggested to you by a well-meaning friend. Perhaps you have tried bending and squatting and stooping, or you may have bought gadgets or rollers [65] or other contrivances guaranteed to make the fat "melt away like magic."

Skipping the next paragraph (reading):

> I have studied this matter of weight control for 25 years, and I sincerely believe there IS no other successful method for most people than to establish this energy balance. I think I can make it easier and simpler for you to do this. I think that if most normally overweight men and women will adopt my system for a short time that they will become convinced that my methods are sound, that they produce no ill effects, and that they DO produce RESULTS. I base these statements on many, many years' experience in ridding thousands of bodies of tons of unwanted fat. I want you to discover for yourself what my methods can accomplish in your case.
>
> Sincerely,
>
> Al Williams

And then on the left side of this first page of this four-page circular there is a column of paragraphs, the last one of which reads:

> If you are overweight and are interested in getting rid of those unwanted pounds of excess fat, it is important that you know these facts. It is important that you know that in adopting these methods you will not be exploring unknown and untried fields. You will be putting into practice certain procedures that for years have proved themselves to be safe and effective for many thousands of other men and women.

Page 2 is headed "It's More than a matter of Looks—It's a matter of HEALTH!" and that is accompanied by a picture of an apparently distraught lady looking into a mirror at a reflection of herself. At the bottom of the page are the pictures which appeared in several of the ads in Exhibit 1 of Mrs. Cooper.

On page 3 there is reproduced apparently a facsimile copy of a letter addressed to Mr. Williams by Mrs. Paul Anderson, and at the left side of that letter there is printed this (reading): [66]

> Here Is
> PROOF!
>
> No matter how many pages you read about "Foods that Take Hunger Away," it all wouldn't mean very much unless you were convinced that these methods actually produce RESULTS—that they actually DO bring about more normal weight without drugs or gadgets or strict diets or violent exercise.

Then there is another paragraph after that and then there are various testimonial quotations at the bottom. And on the back page there is a small sketch of an overweight woman doing backbending exercises in her home apparently and it says (reading):

It's Just Not Necessary!
this endless back-breaking exercising
and "Canary Bird" diets
REDUCING CAN BE FUN!
with
"Foods That Take Hunger Away"

Almost anyone can cut down on his or her caloric intake and lose weight. In fact, when energy intake is reduced below the daily energy requirement, there can be no other result—fat must go. But the difficulty is that most overweight people simply find it too much of a hardship to give up those "extra" heat units. Naturally, you cannot lose weight if you are going to fill up on rich desserts and fats, sugars, and starches. But you CAN learn to control the hunger that make so many reducing programs so unattractive to so many people. Actually, losing weight can be FUN. The "CONCENTRATED FOODS THAT TAKE HUNGER AWAY" make it possible.

These foods, contain 17 different fruits, minerals and vegetables, dehydrated into pleasant tasting tablets. I usually suggest taking of them before meals, and whenever you feel hungry during the day. You will find that after a few days you will not crave to overeat, and you will feel full of pep and have more energy. If you diet without taking

these food supplements, you become too hungry, tired and nervous to stay with a low caloric diet long enough to lose weight. [67]

And then there is a picture of Mr. Williams with some man apparently a customer of his showing how much weight he is supposed to have lost. Then there are several paragraphs at the bottom of the page under the heading "A Word to You Men".

2-C-2 is a small blank asking for names and addresses of other people to whom Mr. Williams might send his literature.

2-C-3 is a folded leaflet "Questions about the Al Williams Reducing Plan which you may wish to ask." On what could be called page 2 of this pamphlet there is the question (reading):

"ARE THE CONCENTRATED FOODS INJURIOUS TO ONE'S HEALTH"

and then the answer (reading):

"NO, your general physical condition improves when you take "THE FOODS THAT TAKE HUNGER AWAY." These amazing foods supply your body with necessary essentials; so in no time at all you will start feeling fine, looking better, and have more energy and vitality. These Food tablets contain NO DRUGS—NO THYROID MATERIALS—NO MEDICINES OF ANY KIND IN FACT, NOTHING THAT COULD NOT BE GIVEN TO A CHILD WITH SAFETY."

The next question is (reading):

"CAN OTHER FOODS BE EATEN WHEN FOLLOWING YOUR REDUCING PLAN AND

TAKING "THE FOODS THAT TAKE HUNGER AWAY?"

and the answer is (reading):

"YES, you may eat any lean meat, fish, poultry, eggs, soups, salads, fruits, cottage cheese, and vegetables. It is almost impossible to follow a given eating plan, but you will find that the plan that I send is very easy to follow, due to the fact that there is a wide selection of foods to choose from."

(Reading):

QUESTION: WHY COULDN'T I DIET WITHOUT TAKING THE [68] CONCENTRATED FOODS AND OBTAIN THE SAME RESULTS?

ANSWER: If you diet without taking the concentrated Food Tablets, you will find that in a few weeks you become hungry, tired, nervous, and run-down physically. Unable to cope with the pangs of hunger, you start to eat more food, and then usually you will gain two pounds for every pound lost—BUT, IF YOU TAKE THE FOODS THAT TAKE HUNGER AWAY you will be able to stay with a food plan, because you will not be hungry, and you will feel good, and have vitality to go about your regular duties.

And then skipping several questions and answers, on page 3 (reading):

QUESTION: WHAT IS THE PURPOSE OF THE SPECIAL MASSAGE CREME?

ANSWER: This Creme acts as an astringent to take up the flabby flesh. Please understand that the

Creme itself does not cause you to lose weight. I don't know of any Creme which will do that. But I have found astringents very valuable to firm the skin as the fat melts away. When used with massage, it tends to tighten the skin so that those pounds you lose won't leave "SAGS" where extra pounds used to be. This Creme is pleasant to use, and is readily absorbed.

Skipping one question and answer we come to (reading):

QUESTION: What are the age limits for following this Reducing Plan?

ANSWER: It is adaptable to men and women and children of all ages. Persons as young as 12 and as old as 80 have reported excellent results from my reducing method.

And then on the back page of this leaflet after it says "REDUCING CAN BE FUN! with Foods and Plan That Helps Take Hunger Away": (reading):

These foods contain 17 different fruits, minerals and vegetables dehydrated into pleasant tasting tablets. I usually suggest taking of them before meals, and when ever you feel hungry during the day. You will find that after a few days you will not crave to overeat, and you will feel full of pep and have more energy. If you diet without taking these food supplements, you become too [69] hungry, tired and nervous to stay with a low caloric diet long enough to lose weight.

2-C-4 is the questionnaire which is also referred to as the "SELF ANALYSIS CHART" to be submitted by the purchaser to the Al Williams outfit when he remits

for the tablets and the plan, and it asks questions: What is your weight now? Height? In the past ten years, what was your highest weight? Your lowest weight? Waist measure Hip Bust Your Age? Nationality? Occupation? Can you exercise? Then it says, "In the following spaces list the kinds of food you eat: BREAKFAST LUNCH DINNER" And then "Do you use the following: How much? Answer yes or no. Tobacco Liquor Soft Drinks Laxatives Elimination is good", and asks whether you have had any operations. On the back is the order blank.

2-C-5 is a printed circular entitled "Here's Proof of Results!" which contains extracts from various testimonial letters and in the center of this page is another duet of before and after pictures. These two are of Mildred T. Troxel. It has the statement she lost 90 lbs. On the Reverse are more testimonials and in the center is cut of a picture of Mr. Williams with Mr. Robert Noble of Los Angeles showing Mr. Noble before and after and it indicates that he lost 72 lbs. in four months.

2-C-6 is a return envelope to Mr. Williams and 2-C-7 is the envelope in which this material was forwarded to Mr. Sheffield.

"(Envelope containing test correspondence over the name and address of Harry Sheffield, Delta, Utah, marked Government Exhibit No. 2 and sub exhibit numbers, was offered and received in evidence.) [70]

By Mr. Mindel:

Q. Inspector, did you also undertake test correspondence in the name of H. K. Spearline of Fillmore, Utah?

A. That is right.

Q. I hand you an envelope marked Exhibit No. 3, and ask you to identify its contents.

A. This is test correspondence directed to Al Williams Health System, 541 South Spring St., Los Angeles, California, over the test name of H. K. Spearline, Fillmore, Utah. It is dated September 8, 1944. And advertisements and replies from the promoter in response to this test correspondence.

Mr. Mindel. I offer in evidence Government Exhibit No. 3. Any objection?

Mr. Lawson. No objection.

Mr. Mindel. Exhibit 3-A, Mr. Solicitor, is a carbon copy of the letter written over the test name H. K. Spearline to the Al Williams Health System (reading):

Gentlemen—

Your ad Mothers Home Life. Please send your free information about your Proved Reduction Plan etc. to

Yours truly

(Signed) H. K. Spearline
Fillmore, Utah

Exhibit 3-B is a circular of the Al Williams Health System and apparently is the same as Exhibit 2-C which I have already read from.

Exhibit 3-B-1 is a mimeographed circular which, from my [71] examination, appears to contain somewhat the same information as the question and answer leaflet that I read from except that at the head thereof I would like to read this statement which is contained there:

Perhaps you do not understand just HOW EASY and SAFE it is to reduce by my method, so I shall

answer a few questions frequently asked by persons anxious to reduce.

3-B-2 is the same as 2-C-1. 3-B-3 appears to be the same as 2-C-5 except for one thing the picture in the center of it is of a different woman. At any rate it is a collection of extracts from testimonial letters. The reverse side of this circular contains the same illustration as the reverse side of 2-C-5 but it would appear that the testimonial extracts appearing on 3-B-3 are not the same as on 2-C-5. 3-B-4 is the same as 2-C-2 except in color. 3-B-5 is the order blank. 3-B-6 is the envelope of Al Williams for return to him. 3-B-7 is the envelope used by him. 3-B-8 is another order blank.

Exhibit 3-C is a mimeographed circular letter of the Al Williams Health System on the same letterhead as the Exhibits 3-B and the one like it in Exhibit 2 but the message appears to be different. It starts out (reading):

Dear Friend:

I was very happy indeed to send you the information about my REDUCING PLAN THAT HELPS TO TAKE HUNGER AWAY, and the other steps that make up my plan of easy weight reduction. However, your application has not yet been received, so I am dropping you this line to add a word to my last letter. [72] Overweight is one of those things that aggravate themselves as time goes on. Every week that is added on to the last week seems to make the decision that much more difficult. All of us tend to put these things off and finally slip into a sort of hopeless frame of mind where we just "let it go."

And then skipping down I read this paragraph:

> THE SPECIAL BODY MASSAGE CREME which I have found so effective in reducing programs in my own establishments should be used. I have found this Creme very valuable to firm the skin as the fat melts away. When used it tends to tighten the skin so that those pounds you lose won't leave "sags" where extra pounds used to be. It is also beneficial when used as directed to beautify the contour of the throat, bust and upper arms, calves of legs, and thighs.

And then the recipient of this letter is urged to "Sit Down right now—think the matter over seriously—" and so forth and so on.

3-C-1 is the circular containing the questions and answers which has been referred to. 3-C-2 is the circular containing extracts from letters of testimony. And the other exhibits attached are similar to those already described.

(Envelope containing test correspondence over the name and address of H. K. Spearline, Fillmore, Utah, marked Government Exhibit No. 3 and sub exhibit numbers, was offered and received in evidence.)

By Mr. Mindel:

Q. Subsequent to that Inspector, did you also conduct a test under the name of Ray Kagar?

A. I did.

Q. I hand you now an envelope marked Exhibit 4, and ask you [73] to identify its contents.

Mr. Lawson. I presume, Mr. Solicitor, that my objection is a continuing objection to all matters prior to November of 1944.

Assistant Solicitor. That is to be so considered, yes sir. The ruling will be the same.

Mr. Lawson. Yes, the ruling will be the same but my objection is of record.

Assistant Solicitor. Let the record show that your objection is a continuing objection.

The Witness. Exhibit No. 4 is test correspondence directed to Al Williams, 541 So. Spring St., Los Angeles, California, over the test name of Ray Kagar, Kokomo, Mississippi, bearing the date of 1/20/45, and responses received to this test correspondence.

By Mr. Mindel:

Q. In this test, Inspector, did you make a purchase from the Al Williams outfit? A. I did.

Q. I hand you an envelope which is a supplemental envelope marked Exhibit 4-1.

Mr. Lawson. I don't quite understand the reference to the outfit.

Mr. Mindel. I beg your pardon. I didn't mean anything derogatory by that. I just meant the respondents per se.

Inspector, I asked if you had made a purchase and you say you have. [74]

The Witness. That is right.

By Mr. Mindel:

Q. I hand you an envelope marked Exhibit 4-1 and ask you if those are the products of the respondents which you received. A. They are.

Q. You purchased a box of the tablets, is that correct? A. That is right.

Q. Which is marked 4-D-7, is that correct?

A. That is right.

Q. And this is the box that you received?

A. That is right.

Q. And you purchased a jar of the massage cream which I have marked here 4-D-8, is that correct?

A. That is right.

Q. And this jar is the one you received?

A. That is right.

Mr. Mindel. I now offer in evidence Government Exhibit No. 4.

By Mr. Mindel:

Q. Inspector, this box of tablets, did you have an analysis made of the tablets? A. I did.

Q. Will you tell us by whom?

A. By the Food and Drug Administration, Department of Agriculture.

Q. You handed this box which we have marked 4-D-7 over to [75] a representative of that agency, is that correct? A. Mr. Frank Casey.

Q. And he is the one who made the analysis?

A. As far as I know he is.

Q. And did you also have an analysis made of this jar or rather of the cream which was contained in this jar 4-D-8? A. I did.

Q. And was that handled in the same way?

A. It was.

Q. And the analysis was made by the same man?

A. As far as I know.

Mr. Mindel. Mr. Solicitor, Exhibit 4-A is a carbon of a test letter written over the name Ray Kagar to Al Williams and it reads:

> I have been trying to take off some weight for some time but have not had much luck.
>
> Understand that this is in your line so I am writing for any information or suggestions you might have.

4-B is a mimeographed circular letter of Mr. Williams on the letterhead of the Al Williams Health System such as previously referred to and the letter itself appears to be the same in content as Exhibit 2-C.

Mr. Lawson. I expect the letters will speak for themselves in that regards.

Mr. Mindel. Well, I am saying that for the sake of the record when you don't have the exhibits before you. [76]

Exhibit 4-B-1 is the mimeographed question and answer sheet which has been previously covered. 4-B-2 is the slip for the names of friends. 4-B-3 is the four-page pamphlet the same as 2-C-1. 4-B-4 is the printed testimonial sheet with the pictures of the ladies on the front and the gentlemen on the back.

Exhibit 4-C is another test letter written by Ray Kagar or rather written in the name of Ray Kagar to Al Williams. It is a carbon copy and reads:

> I note in your circular that one man lost 40 Pounds in 4 weeks by your treatment. I am 57 and weigh 261 being 5'9".
>
> If you can do as much for me I am sending you a money order for $11.00 for the 2 months supply

of the concentrated foods, the plan that helps take hunger away and the large jar of special massage creme. The order blank has been completed.

Yours truly

(Signed) Ray Kagar

4-C-1 is a carbon of a completed so-called "Self-Analysis Chart" in which certain data is given concerning the fictitious person Ray Kagar in response to the question which I have noted heretofore.

4-D-1 is a mimeographed sheet headed "AL WILLIAMS HEALTH SYSTEM, 541 South Spring Street, Los Angeles, California (13)" "FOOD PLAN INSTRUCTION." It says (reading):

> It is almost impossible to follow a given eating plan. The enclosed menu gives you an idea of the kind and the amount of food that you should eat. When you find it necessary to eat different food from what menu calls for, eat food similar and in the same PORTIONS.

And there is set out this statement (reading); [77]

DO NOT ATTEMPT TO DIET WITHOUT TAKING THE CONCENTRATED FOOD TABLETS

Directions for taking the tablets are given (reading):

> Take 1 tablet before breakfast, 2 at noon, and 2 tablets before dinner. Anytime during the day when you feel hungry take 1 or 2 tablets (not to exceed 10 tablets).
>
> DON'T chew the tablets, swallow them with 1/2 glass of fruit juice, skim milk, or if it is a cold day

take with hot soup or broth. If at work and you cannot have the fruit juice, take them with water.

The day that you are exclusively on the Food Tablets, take 2 or 3 tablets during the day when hungry. Take tablets with water, fruit juice, soup, or skim or buttermilk. When following a 2 meal day food plan go every 4th day taking only the Food Tablets. When following a 3 meal day food plan go every 3rd day taking only the concentrated Food tablets.

REMEMBER THE CONCENTRATED TABLETS ARE FOOD and you receive energy from them. You will find a reducing food plan easy to follow when you have pep and are not hungry.

PLAN YOUR MEALS FROM THE FOLLOWING FOODS

And there are a number of foods enumerated. Then it says "DO NOT EAT ANY OF THE FOLLOWING FOODS" and then a number of more are enumerated. Then it says as part of the directions (reading):

The first 11 days follow the 2 meal menu. Follow the 3 meal menu for the rest of the month. Repeat this program, starting with the first day. To hasten results, or if this schedule does not bring suitable reduction, stay with the two meal per day plan.

I know that you will derive a great deal of benefit from this plan. It is important that you follow all of the instructions: The Bathing Plan should be followed as per directions. REMEMBER that good elimination is VERY IMPORTANT. Try and

follow the Internal Bathing Plan, but if you find that you can't take the time to do this then I [78] suggest that you take the ACTIVATORS to bring about good elimination.

4-D-2 is an outline of the "2 meal a Day Food Plan" and there are two headings "BREAKFAST" and "DINNER", and then the eleven days are enumerated. Then on the "4th day" instructions are given "Concentrated Tablets only with glass of fruit or veg. juice, or soup when you feel hungry. Take 2 or 3 tablets every 3 or 4 hours if hungry." It should be made clear that on that fourth day no meals are taken, only the concentrated tablets with the glass of fruit or vegetable juice or the soup when you feel hungry. The same is done on the eighth day. In other words, every four days.

4-D-3 is the "3 Meal a Day Reducing Food Plan" and in which are outlined menus for "BREAKFAST", "LUNCHEON" and "DINNER". Every third day in this plan the person following it is to take only the concentrated tablets as indicated and no regular meals. In fact, nothing but the concentrated tablets with the glass of fruit or vegetable juice or soup. At the bottom of this page it says (reading):

> Eat slowly and masticate food thoroughly. Use salt sparingly and do not use spices or condiments. Practice deep breathing each morning or evening. A mile walk every day is also beneficial. If you can exercise, follow the magic 7 Exercise Chart. You could take the whole box of Concentrated Food Tablets at one time, but it would not be necessary, as 10 tablets per day when you are taking only the Concentrated Foods, is sufficient.

On the back of that page under the heading of "AL WHLLIAM$ SYSTEM OF CONDITIONING" there is outlined what is called a "HOME BATHING [79] PLAN" and there is outlined directions for the application of the massage cream, the second paragraph of which says (reading):

> The Creme should be applied after bathing. To help correct flabby, fat tissue, especially about the neck, double chins, on upper arms and about hips and abdomen first apply hot then cold water, always finishing with cold water, Dry skin thoroughly, then apply a small amount of the Creme, rubbing it into the flesh with a rotary movement. Rub the flesh for several minutes after Creme has been absorbed.

Next is the "INTERNAL BATHING PLAN" which is marked "IMPORTANT", and the internal bathing plan consists of a series of enemas which the person following the diet is instructed to follow. In lieu of the enema plan the person is told he may use Al Williams "ACTIVATORS", that is, according to what he says, "If you find that you do not have time to take the internal bath, then if you are troubled with constipation, you should take the Al Williams ACTIVATORS". 4-D-6 is a pamphlet called "THE 'Magic Seven' EXERCISES" in which certain exercises are outlined.

4-F is the circular received containing the representation upon which I base the amended charge, that is, the amendment to the charges. This circular we have only in this test and it is addressed to Ray Kagar by Al Williams. It is a mimeographed circular but the name and addressee is typewritten in. It says (reading):

Dear Friend:

A short time ago you started my Reducing Plan. I am very much interested in knowing what success you have had. The only way I can Help you to accomplish your desire for self-improvement, is for you to let me know if you have carried [86] out the instructions of the Plan.

And then he asks for certain information: Did you follow the Food Plan? Did you follow the Bathing Plan? Did you take the Internal Bath as directed? Did you use the Massage Creme? HOW MUCH WEIGHT HAVE YOU LOST? Then coming down the page (reading):

Time passes quickly. If you are really serious and follow the suggestions given, you should be amply paid in securing the results desired. If you have only had one order of the Concentrated Foods please bear in mind that it may require several more packages to secure the results desired. I suggest that you continue the plan, so now that you have started you will not lose the benefits already attained.

And then the next paragraph is the one I refer to (reading):

After weight reduction is brought about the Concentrated Foods may be taken occasionally as a general tonic to remain physicially fit. I am enclosing an Order Blank. etc.

The remainder of this exhibit is the same as other items we have already covered.

(Envelope containing test correspondence over the name and address of Ray Kagar, Kokomo, Missis-

sippi, marked Government Exhibit No. 4 and sub exhibit numbers, was offered and received in evidence.)

By Mr. Mindel:

Q. And you undertook, did you not, Inspector, at least one additional test in this case under the name of Olaf Sowder? A. I did.

Q. I now hand you Exhibit No. 5, an envelope marked Exhibit No. 5, and ask you to identify its contents, as well as an envelope marked Exhibit 5-1, [81]

A. Exhibit 5 is correspondence directed to Al Williams Health System, Dept. MH-2R, 541 S. Spring St., Los Angeles, 13 California, over the name of Olaf Sowder, Box 500, Nez Perce, Idaho, on March 30, 1945 and response thereto and subsequent correspondence with the promoter.

Q. You made a purchase in this test also, did you, Inspector? A. I did.

Q. And does the envelope Exhibit 5-1 contain the products of the respondents which were received as a result of that purchase? A. It does.

Q. This box of tablets which I have marked 5-C-7 and this jar of cream which I have marked 5-C-6 are the package and the jar which you received?

A. They are.

Mr. Lawson. May I ask counsel, Mr. Solicitor, if this is merely cumulative proof or is it contended there is a difference in the composition?

Mr. Mindel. I guess you could describe it as cumulative.

Mr. Lawson. Merely for the purpose of determining the composition, the tablets and the cream.

Mr. Mindel. Well, to determine if the representations are consistently made, and don't occur only in the one test.

Mr. Lawson. Now, the portions of the circular letter dated May 12, 1945, which are underlined, is that the underlining of the witness? [82]

Mr. Mindel. Well, frankly it could have been made by anyone who examined it. After it was received from the respondent it passed through several hands and whoever was going over it just underlined it for their own information. I just don't get the point of—

Mr. Lawson. (Interposing) Well, I would object to the introduction of course of any matter that doesn't reflect the exact condition in which it arrived—At the time it was received by the witness—and have it stricken out.

Mr. Mindel. I have no objection to that.

Mr. Lawson. And which would apply if there be any such other underlining in any of the other correspondence that the same motion prevail.

Assistant Solicitor. Are those circulars which are underlined printed or mimeographed circulars?

Mr. Mindel. Yes, sir.

Assistant Solicitor. And the underlining is in pencil or ink?

Mr. Lawson. Both.

Mr. Mindel. Making it obvious that it was not there at the time it was sent out by the respondent.

Assistant Solicitor. Well, if it is agreed by you Mr. Mindel that none of the underlining anywhere appearing in any circular was—in pen or pencil—not there when it came through the mails then I overrule the objection,

because it is not being considered as a part of the representations made by the respondent. [83]

Mr. Mindel. Well, that's correct. I say that the pencil or pen underlinings which might be found on these circulars were not put there by the respondents but were put there after the exhibits were received by the Inspector from the respondents.

Assistant Solicitor. With that understanding in the record, Mr. Lawson, no harm can come to the respondent.

Mr. Lawson. That will be satisfactory.

Mr. Mindel. I offer in evidence at this time Government Exhibit No. 5. Any further objections, Mr. Lawson?

Mr. Lawson. None.

Mr. Mindel. Exhibit 5-A, Mr. Solicitor, is a carbon copy of a letter written over the test name Olaf Sowder to the Al Williams Health System reading:

> I see where your ad talks about dizziness, headaches and heart palpitations in fat people. I have been having these the last 6 months and they seem worse. Do you think fat is the sole reason for them? I weigh about 100 lbs. more than I should. If getting rid of this weight in an easy way will help these conditions, I want to buy your plan quick because that is what I seem to need. My blood pressure has been high in the last couple of years. I can't go up the stairs unless I stop three or four times due to shortness of breath.

The intervening exhibits are the same as others which have already been described. Exhibit 5-C is another

carbon copy of a test letter sent over the name of Olaf Sowder to Mr. Al Williams, dated April 24, 1945 (reading): [84]

Dear Mr. Williams:

I received your literature in answer, to my inquiry but we had one of our boys leave us the other day and things have gotten so badly messed up, I can't find the order blank.

I recalled that the foods that take hunger away and the massage cream were offered for $11.00 so I am sending you a money order for this figure. If there is any more, you can send it c.o.d.

I recall with some interest about the gentleman from Modesto lost 32 pounds and the one losing 72 lbs. in four months. Sounds good.

Looking to hear from you shortly, I am.

5-C-2 is the diet plan which was contained in Exhibit No. 4 and which has been described. The remaining exhibits are printed matter of the respondents which has already been described in other exhibits.

Exhibits 5-C-6 is a jar of the "Al Williams Face and Body Massage Creme", containing the cream, and 5-C-7 is a box of the "Concentrated Foods" as they are called by the respondents on the label, the same as in Exhibit 4-D-7.

(Envelope containing test correspondence over the name and address of Olaf Sowder, Nez Perce, Idaho, marked Government Exhibit No. 5 and sub exhibit numbers, was offered and received in evidence.)

By Mr. Mindel:

Q. Inspector, did you conduct any other investigation of the respondents use of the mails?

A. No, I did not.

Mr. Mindel. That is all.

Assistant Solicitor. Cross-examine, Mr. Lawson. [85]

Cross Examination

By Mr. Lawson:

Q. Mr. Davis, referring to the five exhibits introduced through you and all of the related matters, such as test letters, samples of the cream and the tablets in question and replies to the test letters received by you, was all procured by you as an inspector for the purpose of producing evidence in this case?

A. That is right, sir.

Q. And the persons referred to in the correspondence are fictitious persons?

A. They are termed test correspondents.

Q. They are fictitious persons?

A. That is right.

Q. And the correspondence setting forth certain alleged facts with reference to the particular fictitious persons were all simulated and—

A. Hypothetical.

Q. —hypothetical? And not any allegation of any existing fact? A. That is right.

Mr. Lawson. That is all.

(Witness excused.)

Assistant Solicitor. Call your next witness, Mr. Mindel.

Mr. Mindel. Mr. Casey. [86]

Whereupon,

FRANK W. CASEY

called as a witness for and in behalf of the Post Office Department, and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mindel:

Q. Will you state your full name, please.

A. Frank W. Casey.

Q. Where are you employed, Mr. Casey?

A. Food and Drug Administration, Washington, D. C.

Q. Will you state your qualifications as to education, training and experience.

A. I graduated from the University of Michigan in 1916; was state drug chemist for the State of Michigan; in charge of the chemical laboratories at the Columbia Chemical Company in Barberton, Ohio; Chemist with the Internal Revenue, and for the last fifteen years with the Food and Drug Administration.

Q. Was there handed to you for analysis, Mr. Casey, a box of tablets sold by the respondents in this case?

A. There was.

Q. By whom was it handed to you?

A. Inspector Davis.

Q. And did you make an analysis of some of the contents of that box? [87] A. I did.

Q. Was there also handed to you for analysis a jar containing the massage cream of the respondents?

A. There was.

Q. And that also was handed to you by Inspector Davis, is that correct? A. It was.

Q. And you made an analysis of the cream?

A. I did.

Q. I hand you Exhibit 4-D-7, Mr. Casey, and ask you if that is the box containing the tablets which was handed to you by Inspector Davis.

A. It was because I identify it by my initials FWC and the date on which I received it from him in person.

Q. And as you said you made a chemical analysis of the tablets contained in that box will you state for the record the results of your analysis.

A. Well, I took the weight of the tablets, which are brown coated, and they would average 12.65 grains, and then with the coating removed they would average 11.15 grains. I determined the mineral content which was found to consist of 1.14 grains per tablet of sodium and potassium oxides: 30.38 grains per tablet of kelp which is a filler in manufacturing the tablets; the iron average .10 grain per tablet; the calcium oxide .35 grains per tablet, and on an assay of 12 tablets a trace of iodine was indicated.

Q. Did you arrange, Mr. Casey, to have a microscopic analysis [88] made of these same tablets?

A. I did.

Q. Who made that for you?

A. Mr. Eisenberg.

Q. And who is Mr. Eisenberg?

A. Microanalyst with the Food and Drug Administration.

Q. Can you identify this jar which I have marked 4-D-8 as the jar of massage cream which was handed to you by Inspector Davis?

A. Yes, because of my initials FWC and the date 3-7-45, the date upon which I received it from Inspector Davis.

Q. And you thereafter made an analysis of its contents, is that correct? A. I did.

Q. Will you relate now what the results of your analysis were.

A. The analysis showed that it contained .12% of phenol or carbolic acid; .25% of volatile oils which consisted of menthol, camphor, eucalyptus; 75½% of which was water—that's what they make the cream from, the water in the cream—incorporated in a greaseless base.

Q. And after you and Mr. Eisenberg were through with your examinations you returned these two exhibits to Inspector Davis, is that correct?

A: That is correct.

Mr. Mindel: That is all, Mr. Casey: [89]

Cross-Examination

By Mr. Lawson:

Q. Mr. Casey, referring to Exhibit 4-D-7, did you make an examination of the contents for the purpose of determining whether or not the articles referred to or the vegetables and minerals referred to on the reverse side of that container were correctly represented?

A. I didn't. Mr. Eisenberg did that. I determined the weight of the tablets and the mineral content of the tablets like the iron, the kelp, and so forth. Mr. Eisenberg identified the ingredients as such.

Q. Then your testimony is only to the chemical composition? A. That is correct.

Q. Now with reference to the cream, you did make reference to specific chemicals, did you determine whether or not those referred to on the container were present?

A. That is correct. I said they were there.

Q. In other words, the label on 4-D-8 is correct in so far as it refers to the particular chemicals?.

A. That is correct.

Mr. Lawson: That is all.

(Witness excused.)

Mr. Mindel: Mr. Eisenberg, will you please take the stand. [90]

Whereupon,

WILLIAM V. EISENBERG,

called as a witness for and in behalf of the Post Office Department, and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mindel:

Q. State your full name, please.

A. William V. Eisenberg.

Q. And where are you employed, Mr. Eisenberg?

A. Food and Drug Administration, Washington, D. C.

Q. For the record, Mr. Eisenberg, will you give us your background as to experience, education and training.

A. I received a bachelor's degree of B.A. in chemistry in 1934 from Brooklyn College; a master's degree of M.A. in botany from George Washington University in Washington, D. C.; and I have taken graduate work in chemistry and botany at Catholic University and at the United States Department of Agriculture Graduate School.

I have been employed as a microanalyst by the Food and Drug Administration for the past eight years.

Q. And in the course of your duties there, Mr. Eisenberg, was there handed to you by Mr. Casey who preceded you on the stand a box containing tablets sold by the respondents in this case? [91]

A. Yes, I received a box containing tablets called Al Williams Concentrated Foods.

Q. Was that this same box which I have marked 4-D-7?

A. Yes. My initials on the box WVE 3-12-45 indicate that.

Q. And thereafter, Mr. Eisenberg, you made a microscopic analysis of the contents of some of the tablets, is that correct? A. Yes, of the tablet.

Q. Will you state now what the results of your analysis were.

Mr. Lawson: Just a moment. May I ask, Mr. Solicitor, the purpose of a microscopic examination.

Mr. Mindel: That is to reveal the information about which you have just asked Mr. Casey as to the various plant life in there—various foods—as indicated on the back of your box. Go ahead, Mr. Eisenberg.

The Witness: The microscopic examination of the decoated tablets identified appreciable amounts of the following ingredients: Alfalfa leaf and stem, wheat flour and soy bean flour. I also identified small amounts of the following ingredients: rhubard root, parsley leaf, spinach leaf, lettuce leaf, beet leaf, celery seed, capsicum fruit, carrot, animal meat tissues and asparagus. I also identified traces of yeast, kelp, and ginger rhizome.

Q. That was the complete result of your analysis?

A. That is the complete miscroscopic result. [92]

Mr. Mindel: That is all.

Cross-Examination

By Mr. Lawson:

Q. If I understand your testimony correctly, Mr. Eisenberg, the vegetables and other contents that you found as a result of your examination in so far as it refers to the specific vegetables is practically identical with the label on the box.

A. I would have to see that label, please.

Mr. Mindel: I don't think, Mr. Solicitor, the witness should be called upon to make a conclusion as to the identicalness of his findings and the statement on the label. His findings are in the record now, and the label is in evidence and I think it is for the Solicitor to determine himself whether or not they are identical.

Assistant Solicitor: I think counsel may ask the question though, Mr. Mindel, what difference if any and was it appreciable. What difference between his microanalysis and the ingredients stated upon the box.

The Witness: I note immediately that there are some discrepancies in my analysis and those marked on the label, I found, for instance, wheat flour—appreciable amounts of wheat flour and soy bean and I see no reference to that on the label.

By Mr. Lawson: [93]

Q. Wheat flour and— A. Soy bean flour.

Q. What other difference, if any?

A. I probably found no watercress, endive or escarol as marked on the label or chickory. I note in my report I have found certain ingredients which are not on the label, such as capsicum fruit or chili powder, which is another name for chili. No reference to capsicum is made on the label.

Q. Well, what is capsicum?

A. Capsicum is the general term for the red peppers which include chili.

Q. Which would include chili? A. Yes.

Q. Is that all that you have found in your examination or analysis that would show any difference from the label on the container?

A. That is all I see right now.

Q. What number of tests did you run to determine the presence of each one of these ingredients on the container?

A. I examined a composite of fifteen tablets from the box. I mixed up fifteen tablets and I examined the mixture microscopically to determine the various ingredients that are found in the product.

Q. In making a test for the purpose of any particular ingredient, do you have to make a different test for one than you do for another ingredient? [94]

A. Each ingredient is recognized under the microscope by its specific cellular structure. Lettuce, for instance, would have a cellular structure which is specific for lettuce. Beet and parsley would have cellular structures which are different from each other and which would diagnose that particular vegetable. The various ingredients are recognized under the microscope at a magnification of one hundred or two hundred times from the specific cellular structure.

Q. Mr. Eisenberg, when you were handed this Exhibit 4-D-7 for the purpose of making a microscopic examination, did you first look at the label to find out what the ingredients were there? A. Yes.

Q. And then did you make an examination to determine the presence of those ingredients?

A. I first made an examination to determine what the material consists of.

Q. Well, I am asking you if you made an examination specifically to determine the presence of the particular articles here that you describe as not present?

A. Yes, of course.

Q. Did you make such an examination?

A. Yes, I made an examination to detect the ingredients on that label if they were there.

Q. And it occurred to you that those particular ingredients were not present, is that correct? [95]

A. That is correct. The ingredients that I found in the product are listed in my report. If I don't list an ingredient I didn't find it.

Q. In other words, those particular ingredients that you have referred to as wheat flour and soy bean, watercress and endive could have been present, could they not, and you not detect them?

A. I beg your pardon, I did say that I detected wheat flour and soy bean.

Q. Oh, I see.

A. I did not find the others.

Q. Well, that only leaves watercress and endive.

A. I don't believe that is so. May I see the label again, please?

Q. Well, if it isn't correct, whatever the items were not mentioned I—

Assistant Solicitor (interposing): He mentioned flour.

Mr. Lawson: He mentioned four. As I have them, wheat flour, soy bean, watercress, endive and that other peculiar name—

The Witness: Capsicum.

Mr. Lawson: —capsicum which is the same as red pepper.

The Witness: Yes, that includes red pepper.

Mr. Lawson: Well, the way I have it it is watercress, endive and this other ingredient. Now, did you make any particular note as to the fact that those three were not present?

The Witness: No, I didn't note it. I just noted what I found. The label of course speaks for itself and would indicate what— [96]

Mr. Lawson: As a matter of fact, at the conclusion of your examination you didn't make any note as to what wasn't present?

Mr. Mindel: I object to the question. He has answered already and of course if he goes on to say what wasn't present, why, he could list numberless items. He has said that he first made the test, as I recall his testimony, to determine whether there was contained therein the products which were shown on the label. Isn't that correct?

The Witness: Yes.

Mr. Mindel: And then he went from there to determine what actually could be found under the microscope. I think by that testimony he has covered completely the course of his examination of the product.

Assistant Solicitor: I don't think your objection from a technical standpoint is sound, Mr. Mindel. I think counsel may ask him did he make any note of those. It's applied to that—

Mr. Mindel (interposing): Well, he has already answered that, Mr. Solicitor.

Assistant Solicitor: Well, not in that exact language. Let him answer the question.

Mr. Lawson: Did you make any note of the non-presence of any of the ingredients of which you have testified are not present?

The Witness: No, I did not make a note on my report. [97]

By Mr. Lawson:

Q. When you were asked to make the examination I assume that you were asked to determine the presence of the different ingredients reflected in the label; is that correct?

A. No. I was asked to make an examination of the tablets to find out what they consist of.

Q. In making the microscopic examination, Mr. Eisenberg, what are the mechanics? You put the particular ingredient or the contents of these tablets, I take it, under the microscope and then you discover the presence of a particular cell which has an identity of say parsley and make a note of that, is that it? A. That is right.

Q. And that would apply to spinach or any other particular substance? A. Yes.

Q. Do you make one examination?

A. Oh, no. The actual mechanics involve three microscopes. We use a low power microscope in which we examine the powder and pick out fragments which are dissimilar from each other under the low power magnification of about 20 diameters. These particles may be transferred to another slide and examined under a higher power, say 100 diameters; and identified in that way. In other words, it is both a macro- and a microscopic examination, one using a low power in which the eye aided by a small amount of magnification is able to pick out particles and the other in [98] which these various particles are specifically confirmed from the cellular structure. Not from the general appearance but from the cellular

structure to be parsley or beet or spinach. The slide, which is made, may be transferred to another microscope, a petrographic microscope, in which the effect of polarized light on these cells is determined. And it is from these various tests and comparison with authentic material which we have studied and noted, the identity of the various ingredients is determined.

Q. How long a time does it take you to conduct the entire examination?

A. My record shows six hours.

Q. That includes the three different steps that you referred to? A. Yes.

Q. Would you want to state, Mr. Eisenberg, as a chemist that there could not have been the presence of some other ingredient in the composition that you examined?

Mr. Mindel: I just wish to clarify. I believe Mr. Eisenberg has qualified as a microanalyst and not as a chemist.

Mr. Lawson: Well, I take it he knows chemistry too. But your particular qualifications as a microanalyst, Mr. Eisenberg, your qualifications here are not questioned. But I am asking you to state whether or not you want to as an expert in your particular field make the statement that there could not have been some ingredients in that composition which you analyzed that could have [99] escaped your attention.

The Witness: If there was any ingredient which I have not listed it might have been present in a mere trace I would say. Of course anything that would have been present in a significant amount would have been readily recognizable under the microscope at the high magnification we use.

Mr. Lawson: I guess that is all.

Redirect Examination.

By Mr. Mindel:

Q. Can you assert mathematically what that mere trace would consist of?

A. No, I don't believe I would like to state it in mathematical terms but it would be very insignificant, probably one-tenth of one per cent.

Mr. Mindel: That is all.

Assistant Solicitor: Any further questions.

Recross-Examination.

By Mr. Lawson:

Q. How many tablets did you put under the microscope?

A. I made a composite of fifteen tablets and I made dozens I would say of slides, perhaps running into a hundred or so.

Q. Did you make your tests entirely from the contents of the one container which— A. Yes.

Q. —designated as—

A. I took fifteen tablets from that one container. [100]

Q. —4-D-7? A. Yes.

Mr. Lawson: That is all.

(Witness excused.)

(Whereupon, the hearing was recessed at 12:20 p. m. until 1:40 p. m. of the same day.)

After Recess.

Mr. Mindel: At this time I call Dr. Putnam to the stand.

Whereupon,

DR. LAWRENCE E. PUTNAM,

called as a witness for and in behalf of the Post Office Department, and, having been previously duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Mindell:

Q. Will you state your full name, please, Doctor.

A. Dr. Lawrence E. Putnam.

Q. Where are you presently employed, Doctor?

A. I am employed at the Food and Drug Administration, Washington, D. C.

Q. Will you recite your qualifications as to education, [101] training, and experience.

A. I received the degree of M.D. at Harvard University Medical School in 1934. From 1934 to 1938 I interned in several hospitals in Boston, Massachusetts. From 1938 to 1939 I was on active duty with the United States Army assigned to the Civilian Conservation Corps. From 1939 until January, 1941, I was a medical officer for the Veterans Administration, Washington, D. C. Since January, 1941, I have been with the Food and Drug Administration.

Q. Will you tell us, Doctor, what your duties are at the Food and Drug.

A. My duties at the Food and Drug Administration include the examination of labels to determine whether or not they comply with the various sections of the Food, Drug and Cosmetic Act. Medical advice is given when necessary on problems as they arise in the enforcement of this Act.

Q. Have you made a special study, Doctor, of the condition known as obesity and its causes and treatment?

A. I have.

Q. What is the principal cause of obesity?

Mr. Lawson: I take it now that you are asking for opinion evidence?

Mr. Mindel: Yes, sir.

Mr. Lawson: Well, may I ask a few questions, Mr. Solicitor?

Assistant Solicitor: In the nature of a preliminary examination? [102]

Mr. Lawson: Yes.

Assistant Solicitor: Yes, you may.

Preliminary Examination.

By Mr. Lawson:

Q. Dr. Putnam, have you had any experience as a practicing physician?

A. Yes, I have. I neglected to give full qualifications. I might amplify the statements that I have made.

Q. Will you please state those.

A. In 1936 I was licensed to practice medicine in the State of Maine and in the State of Massachusetts. In 1942 I was licensed to practice in the District of Columbia, and I have been practicing in the District of Columbia since 1942. I am at present and have been since 1941 a clinical instructor in medicine at the George Washington University School of Medicine, Washington, D. C. I am on the Dispensary Staff of Emergency Hospital of this City as well as Associate Visiting Physician at Gallinger Hospital of this city. I am on the courtesy staff of several hospitals in this city—four in number—but that is no particular qualification except that you are permitted to

bring patients into those hospitals. I am an Associate of the American College of Physicians and have been since 1942.

Q. Now in 1936 you state that you were licensed in the State of Maine and in Massachusetts. Did you actually practice [103] your profession there?

A. I did not practice in Maine but I did practice for short spaces of time in Massachusetts. In between appointments at hospitals, nothing very extensive.

Q. Well, just state the extent of your practice in Massachusetts.

A. Not over a three month period at one time.

Q. Was that as a general practitioner?

A. Yes.

Q. And what type of cases did you handle at that particular time?

A. Well, I didn't see many and I would take whatever I saw. That is what general practice is. At the present time my practice is limited to internal medicine and has been since 1942 when I started in the District of Columbia.

Q. Now, you state you have been practicing in the District of Columbia since 1942. Please state to what extent.

A. My practice is limited to evening hours and week ends including Sundays.

Q. Is that in the private practice?

A. That is in the private practice of medicine.

Q. Not related to any official duties with the Food and Drug Administration?

A. No, sir, except the only relation is that any experience I may gain in my private practice is brought to my knowledge as a medical officer for the Food and Drug Administration. [104]

Q. Now, you state that you practice on week ends and Sundays. Is that appreciable? By that I mean, do you handle very many cases?

A. Well, it depends on what you mean by appreciable.

Q. Well, those are all approximate terms. But is it just an occasional case that might come to you through courtesy by reason of the emergency situation?

A. I don't believe so. I don't see emergency cases. As a matter of fact I see cases only by appointment and it has to be the type case that I want to see.

Q. And that too would be in the general practice, all types of cases? A. No, internal medicine.

Q. Just in internal medicine? A. Yes.

Q. Now, have you given us the extent of your practice as a physician? A. I believe so.

Mr. Lawson: I guess that is all.

Assistant Solicitor: Any statement you care to make as to qualification or argument—I mean, any objection rather, to the witness?

Mr. Lawson: Well, I think the witness is a qualified witness but I think the weight of his testimony is to be determined by the extent of his practice with regard to any particular case.

Assistant Solicitor: That's a question of weight.

Mr. Lawson: That's a question of weight. I think the [105] witness is qualified.

Assistant Solicitor: Proceed with your examination, Mr. Mindel.

Direct Examination.

By Mr. Mindel:

Q. In your practice and study of internal medicine that would include cases involving obesity, would it not?

Mr. Lawson: I object to leading questions.

Assistant Solicitor: The question is leading, Mr. Mindel. Oh, it is in an informal way. He was asking whether obesity was included in internal medicine; whether or not it is.

Mr. Mindel: Well, I don't think I have to lead the Doctor as to what is included in any field of medicine. However, is obesity included in internal medicine?

The Witness: The study and treatment of obesity is included in internal medicine.

By Mr. Mindel:

Q. I ask you again the question: what is the principal cause of obesity?

A. The principal cause of obesity is the intake of a greater amount of energy, as calories, as compared with the output measured in the same way. That is really not a definition of obesity but that is a definition of the cause of obesity. The definition of obesity—another word for obesity is overweight, simply stated. [106] And obesity is a condition characterized by deposits of fat.

Q. What governs the intake of energy, Doctor? Where does one derive his energy?

A. One derives the energy from the intake of foods.

Q. And he expends his energy in his daily activities, is that correct?

A. He expends his energy by living and breathing and also by his activities.

Q. Would you say then that the, paraphrasing and perhaps in layman's language, the principal cause of obesity is eating more food than the activities of one's body demand?

A. Well, that is approximately correct. I would say that the condition of obesity comes from taking in more than you put out.

Q. How would you, Doctor, treat an obese person to help him eliminate his obesity?

Mr. Lawson: Well, I object to that for the reason that we in more formal proceedings might term this incompetent, irrelevant and immaterial, as to what this might do.

Assistant Solicitor: I can't see where it is immaterial or irrelevant certainly, Mr. Lawson. I will hear you on the question of incompetency of the question, however.

Mr. Lawson: I take it that the witness had not yet qualified himself to give an expert opinion upon a particular treatment.

Mr. Mindel: He has qualified as a medical expert on obesity, certainly. [107]

Assistant Solicitor: Well, I overrule the objection on that ground. Let him answer the question.

Mr. Mindel: How would you treat an obese person, Doctor, to help him eliminate his obesity?

Mr. Lawson: Parden me. May I add the further objection for the purposes of the record that the question here at issue, as I see it, is not what this particular witness might do or not do under a particular circumstance. That is not the issue. The issue is as to whether or not the statements made with reference to the particular preparation involved in this case are false.

Mr. Mindel: In testifying as an expert the testimony he gives represents the best medical opinion.

Mr. Lawson: Well, that is an assumption. That is the danger of this type of—

Assistant Solicitor (interposing): Well, it is competent for this witness to testify under these issues as to what constitutes proper scientific treatment for obesity.

Definitely that's admissible in my opinion. So, if that's all you have to say about the matter I overrule your objection.

Mr. Mindel: Do you recall the question, Doctor?

The Witness: The question, I believe, was how I would treat a patient with obesity.

Mr. Mindel: That is right.

The Witness: I would treat a patient with obesity by cutting down the intake so that it was less than the output provided I wished [108] to reduce that patient.

By Mr. Mindel:

Q. Well, would the same treatment be prescribed for every obese person?

A. I might not reduce all these patients but if I did reduce details would vary depending on the patient's age, sex, occupation, previous history of disease, family situation; income, and so on.

Mr. Lawson: It is understood that I may have a continuing objection to this type of testimony.

Assistant Solicitor: Well, what testimony does the objection cover; any discussion of the treatment of obesity?

Mr. Lawson: If I may restate it again—

Assistant Solicitor (interposing): In other words, not limited to the particular treatment which is ineffective.

Mr. Lawson: That's right.

Assistant Solicitor: Well, I overrule that objection and the record may show that it may be treated as a continuing objection, that is, anything that doesn't deal with the particular treatment sold by the respondent. Is that your position?

Mr. Lawson: I don't quite understand your statement.

Assistant Solicitor: In other words, any testimony concerning the treatment of obesity which does not specifically concern the treatment sold by the respondent. In other words, your position is that the testimony on the treatment of obesity should be limited to the particular treatment sold by the respondent. Is that correct? [109]

Mr. Lawson: Yes, or rather conversely stated that the testimony of this witness as to how he would treat obesity is not competent to prove any of the issues in this case.

Assistant Solicitor. Well, I assume he is giving the proper—Maybe the question isn't asked in exactly the right—He might ask what is the proper treatment for obesity, not just what the Doctor would do. What is the proper scientific treatment, if that's what you are objecting to. I rule that the witness has the right to testify concerning the proper scientific treatment of the condition or ailment or whatever it may be known as, known as the public uses it.

By Mr. Mindel:

Q. You have stated, Doctor, that there are some obese persons whom you would not reduce. Will you explain that?

A. Well, it is conceivable that a patient may have had tuberculosis. The patient may have been made overweight purposely by a physician. The purpose of making a patient with tuberculosis overweight is to keep him on the good side of health. If he loses weight he may expose himself to a reactivation of the tuberculosis. He may reactivate his tuberculosis by a sudden loss of weight; by a rigid diet for example. Such a patient should not be reduced. There may be other patients who for reasons of similar nature should not be reduced.

Q. Would it be necessary to examine personally each obese person before prescribing any regimen of conduct or any treatment [110] for him for the reduction of his overweight?

Mr. Lawson: Mr. Solicitor, I want to add to the objections that I have made heretofore and also addressed to the testimony just stated that this is not a case of where we are accused of practicing medicine illegally. We are charged with making certain false statements with reference to the particular use and efficacy of the particular method. Now, we are getting into the field of practicing medicine, as to whether or not the respondent in this case conducted his business along scientific lines such as a doctor would. That isn't the charge in this case and it's conclusive.

Mr. Mindel: The respondents offer their method of reducing to all who will buy it. They do everything they can in their literature to encourage every obese person to buy their course. They don't know when they sell it to them what the man's condition is and they don't attempt to find out except by this cursory questionnaire what his condition is and no one of course could diagnose an individual through the mails. And they also do their best to make the individual think that regardless of what his situation in life is this is an efficacious method of treatment for him and they say this is an effective way for children of twelve or for persons as old as eighty. They make statements such as that to make it quite clear that they are offering this scheme for sale to every person who has the money and inclination to send that money in to AL WILLIAMS and to buy his scheme from him. They don't say go to your doctor and see whether or not this system is going to hurt you or help you. And we

charge that not all persons [111] can buy and use this scheme without a possibility of harm, and that is what we are attempting to show here that there is an element of harm here in certain cases.

Assistant Solicitor: In the first charge, Mr. Lawson, it says that the respondent is representing "That obese persons will lose weight easily and safely through use of the said plan." On that basis I think the question is competent.

Mr. Mindel: Anything further?

Mr. Lawson: No, it has already been ruled upon.

Assistant Solicitor: Yes I ruled upon that.

By Mr. Mindel:

Q. I believe the last question was: should the same method of treatment be prescribed for every obese person?

A. Well, I believe I have answered that, perhaps not well enough, that if reduction is decided upon after a careful history, physical examination and laboratory work when indicated then the reduction would be the same on same general principles but the details would vary with each patient.

Q. Can treatment for obesity be safely given through the mails as respondent endeavors to do in this case?

Mr. Lawson: Just a moment. I object to that. It is entirely incompetent. That's asking this witness to decide the issues in the case. Calling for a conclusion.

Assistant Solicitor: I don't believe the question is competent, Mr. Mindel. I think you could examine the doctor [112] concerning what diagnostic measures need be taken in certain cases but just to ask the broad question of what could be done through the mails isn't competent.

Mr. Mindel: All right. Would you, Doctor, prescribe treatment for obesity merely by correspondence with the patient?

Mr. Lawson: I object to that on the same ground.

Assistant Solicitor. I sustain the objection for the same reason, Mr. Mindel.

Mr. Mindel: Doctor, do you consider the information requested in the self-analysis chart which is sent out by the respondent sufficient upon which to prescribe a treatment for all obese people?

Mr. Lawson: I object to that on the same ground, your Honor.

Assistant Solicitor: Well, I don't think it comes under the same ground because that is to the particular means that the respondent has for getting the information that was read into the record, and he asked the question, as I understood him, as to whether the information obtained through the responses to that questionnaire would give a medical man sufficient information about a patient to give him proper treatment. Was that your question?

Mr. Mindel: Yes, sir.

Mr. Lawson: And yet it may not be sufficient for a physician but that wouldn't necessarily have any bearing upon the particular [113] issue. I might state very frankly that this is a surprise to me to have the case tried on the theory as to whether or not we were selling the preparation and plan here involved in such a manner that would comply with medical standards. I don't so understand the law. And I don't think that there is sufficient information here to put us on notice that that was the theory of the Government in this case.

Mr. Mindel: Well, the word "safely" appears in the first charge and that word certainly is clear in its meaning, and only a doctor can testify as to whether or not a

particular regimen of conduct for an individual is safe for his health.

Mr. Lawson: Well, we are being measured here, Mr. Solicitor, by medical standards and we have not been charged in that capacity. That is the objection that I make.

Assistant Solicitor: Well, understand me, Mr. Lawson, we don't hold here in the Department that medical standards in the sense of a practicing physician must be followed. We wouldn't have any right legally to take the position that treatment couldn't be sold through the mails but we do have the right under the statute—the Postmaster General has the right—to determine by hearing medical testimony whether the representations are true or false. Now, the Government says that the respondent is representing that this treatment, that this plan, will cause one to lose weight "easily" and "safely." Now, I don't know whether your literature so represents until I give it the most [114] careful examination. Let's suppose that it does represent that it can be safely taken with no limitation as to physical condition or anything of the kind and that that representation turns out to be false according to medical testimony. Then that is the basis for a fraud order. He is representing that it can be safely administered—self administered. That doesn't mean you have got to come up to the standards that the doctor practices or anything of the kind. We can receive evidence as to whether it can be safely followed by an individual, and I think we can receive medical testimony upon that subject and I so rule.

By Mr. Mindel:

Q. The self-analysis chart which I have just referred to in the question which I gave to you, Doctor, is Exhibit

5-C-3, and I ask you to examine that now and try to answer my question therefrom.

A. The questionnaire is inadequate to determine whether or not it is safe for a patient to reduce.

Q. You will notice at the bottom of that chart there are questions as to whether one uses liquor and tobacco, or drink soft drinks, or whether he has faulty elimination. What part would they play in your prescription of a treatment for an obese person?

A. Well, in treating an obese person as any other person one usually takes a complete history and does a complete physical examination and the complete history includes questions concerning tobacco, liquor, soft drinks, and so on. But, one cannot tell in [115] advance whether or not the answers to those questions are going to make it a part of the case or not. If, for example, the patient smokes it may have no bearing on the diet prescribed. On the other hand, if the patient drinks soft drinks every hour or ten, two and four, or whatever time during the day the patient may drink soft drinks, that may play a very important part because there may be sixty or a hundred calories in each soft drink. So that from the point of view of intake soft drinks and liquor might be important. As far as tobacco is concerned there are no calories from smoking tobacco but it may give the physician an insight as to nervous habits the patient may have. The patient may be constantly picking up cigarettes and smoking them and at the same time picking up pieces of candy and eating them for the same nervous habit. So that while the information obtained here is of value to a physician, it in no sense makes it a complete history nor does it give an individual such information when the answer is merely written on a one inch line. There must

be a discussion of the subject between the physician and the patient.

Q. That's the point I was just going to try to make; that is, would a simple answer yes or no give the physician the necessary information? A. Probably not.

Q. And wouldn't that information have to be given consideration in connection with a general examination of the patient?

A. I don't know what you mean by that question. [116]

Q. Wouldn't the information gleaned from answers to those particular questions have to be taken into consideration with a general examination of the patient involved; that is, you couldn't do it or could you do it on that information alone?

A. Well, when you say general examination I believe you mean physical examination.

A. Well, yes. The history and the physical examination have to be taken into consideration together.

Q. In deciding what treatment to give an obese person, Doctor, is it sometimes necessary to resort to laboratory tests?

A. Yes. As I mentioned before, all patients should receive a complete history, a complete physical examination and laboratory work when indicated.

Q. In Exhibit 2-C of the Government exhibits there is a statement of the respondent that one of his customers lost ten pounds in three days, another one lost thirty-five pounds in thirty days, and then he goes on to say that those instances are not rare exceptions. Are there some obese persons, Doctor, who would be harmed by such a rapid loss of weight?

Mr. Lawson: Just a moment. May I see that particular exhibit?

Mr. Mindel: Yes. Do you recall the question, Doctor?

The Witness: No, I don't.

Mr. Mindel: I stated that in 2-C the respondent writes that—Well, these are his exact words (reading): [117]

> Letters which tell of 10 pound losses in 3 days, 35 pound losses in 30 days, 73 pounds in six months. I assure you that these cases are not rare exceptions.

I say are there some obese persons who would be harmed by such a rapid loss of weight?

Mr. Lawson: Just a moment. I object to that. It is not a competent question as related to the particular statement in Exhibit 2-C. The question involved there is as to whether or not that specific representation is true or false, and I don't know what particular charge that is related to in the memorandum of charges.

Mr. Mindel: It is under safety, Mr. Lawson.

Mr. Lawson: Under the first one?

Mr. Mindel: Yes, sir. We are still dealing with safety.

Mr. Lawson: Well, I still submit that the question is not related to the specific representation made here. And if he were asked to decide that question it would still be incompetent because the conclusion of the witness is certainly not based upon any evidence before the court.

Assistant Solicitor. Except the representation in the literature.

Mr. Lawson: The fact that it was made. Its truth or falsity, there's certainly no basis for his opinion because

it doesn't show that he made any examination of the customers.

Mr. Mindel: Well, for the purposes of the question I assume [118] that we can accept the respondent's representation. He is making that representation and he is saying that it is safe. We are not adding anything to it except to question the doctor as to whether such a loss would be safe.

Assistant Solicitor: The first question is whether that representation is true or false. Whether it would accomplish that. If it will accomplish that then would it be safe. I am not inclined to sustain the objection because of that question of the safety of the respondent's treatment for anyone and it is advertised to the public generally. It is definitely an issue under the first charge and he avers that can be accomplished. That is not in issue. It isn't charged that is false but he is asserting that can be accomplished by this treatment. So, asserting that, then isn't the question competent whether that would be safe when he asserts that that much can be taken off by his treatment? The truth or falsity of that statement is not in issue here but the respondent asserts that that can be done and I think for that reason it would be competent. I will be glad to hear you on it further, Mr. Lawson.

Mr. Lawson: I don't know as I could add anything to it except that this witness has testified as a physician—and I am not quarreling with his qualifications in expressing an opinion—but he has stated as a physician and as any physician would testify that there should be an individual examination in each case. That's medical treatment. Now, there isn't any proof here as to just [119] what may have been done in the particular cases

involved here, that is, as to the particular persons who purchased these tablets, unless we indulge in the assumption that the sale was not properly made under proper information. It's just jumping from a conclusion that because it wasn't scientifically, let us say, administered or sold that it wouldn't be safe. That is the vice of this whole testimony in my judgment.

Assistant Solicitor: No, he is offering for sale a treatment through the mails which is advertised as being capable of effecting rapid reduction in weight, and it is charged in the memorandum of charges that the respondent also advertises that such rapid reduction may be accomplished safely. Therefore, there is an issue of whether such rapid reduction can be accomplished safely. So for that reason I think it is entirely competent and for the reasons I have stated I am so ruling.

Mr. Mindel: Will you answer the question, Doctor. Are there some obese persons who would be harmed by such a rapid loss of weight?

The Witness: Yes, there are. As I have explained before, the patient with the previous tuberculosis may become ill. A patient who had diabetes, for example, might be thrown into acidosis by a sharp reduction in diet which would bring about combustion of his own fat and in an improper manner so that the fat gave rise to acetone bodies or acid bodies in the urine and the patient would be thrown into acidosis which is a serious condition. [120]

By Mr. Mindel:

Q. These laboratory tests which you stated should be made before any treatment is prescribed for an obese person, might they indicate in some instances the presence of hypothyroidism in the patient?

A. Did you say "hyperthyroidism"?

Q. "Hypo". A. "Hypothyroidism"?

Q. "Hypo", yes.

A. Yes, it is frequently necessary to have laboratory tests to make a diagnosis of hypothyroidism.

Q. Well, if the patient did suffer from hypothyroidism would it be safe for him to follow the plan offered by the respondent to the public generally?

Mr. Lawson: Well, that is assuming a fact not in evidence, "was anybody." Whoever purchased these tablets was actually suffering from that particular ailment—

Mr. Mindel (interposing): Without any additional attention or treatment?

Assistant Solicitor: Well, I have got an objection before me.

Mr. Mindel: Well, I was just trying to finish the question.

Assistant Solicitor: I just wanted to apprise the witness that I had to rule on the objection. You haven't yet established, Mr. Mindel, that this witness even knows what this plan is. That he ever examined the plan and knows what it is. [121]

Mr. Mindel: That is true.

Assistant Solicitor: That is necessary before he can answer questions concerning the efficacy of the plan.

Mr. Mindel: All right, sir. We will come back to it.

By Mr. Mindel:

Q. Generally speaking, Doctor, without particular reference to this plan, would you say that the question of a person's age must be given consideration in prescribing a weight reducing program?

A. Certainly it should.

Q. Well, should persons of all ages follow the same kind of a reducing diet?

A. As I have said before, the general principles of reducing are the same but the details vary with age, sex, occupation, previous diseases, present, physical examination, laboratory tests, whatever you find; the details vary.

Q. Well, I come now to the question: have you studied this diet that is sold by the respondents in this case?

A. I have.

Q. How would you describe it, Doctor? What kind of a diet would you call it?

A. It is a strict diet.

Q. And will you explain just what you mean as a doctor by a strict diet?

A. Well, I mean that it is a strict low calorie diet. Any diet could be strict whether it is high or low. This is a low calorie diet. [122]

Q. You will recall perhaps that I handed to your for ready reference Exhibit 4-D-1, which is the diet plan sold by the respondents, and you will note that there are two phases of the diet, one prescribing two meals a day at the outset and then you go on a three meal a day diet. Can you tell us or will you tell us the average number of calories provided daily under these plans?

A. In the two meal a day food plan the average number of calories in the breakfast is about 250, the average number of calories in the dinner is 350, a total of about 600 calories daily. This does not include the days number 4 and 8 when the tablets are taken with fruit or vegetable juice or soup. On those days the caloric intake would be very low, somewhere between 75 and 150 or more calories.

Q. You mean for the whole day, Doctor?

A. For the day. On the three meal a day reducing food plan the average number of calories taken at breakfast would be 150 calories and the average for each of the other two meals, luncheon and dinner, would be about 350 calories, making a total of about 750 calories daily except on those days when the tablets are taken with fruit or vegetable juice and no meals are eaten. Those are days number 3, 6 and so on.

Q. Going back to the first part of this program, the days where the patient takes nothing but the tablets and the accompanying liquids, how many calories on an average would he consume [183] on the whole day?

A. I am sorry. I may have made a misstatement. I believe I said 75 to 150 or more calories. That would apply to each glass of fruit or vegetable juice or soup and if that were taken several times a day the number 75 to 150, or roughly a hundred, would have to be multiplied by the number of glasses of juice or soup that were taken.

Mr. Lawson: Does that relate to plan four?

The Witness: That relates to both.

Mr. Lawson: Four and three?

The Witness: Both plans. The directions are the same for those days on both plans. Both the two meal a day plan and the three meal a day plan have days when only tablets and juices or soup are taken. The directions are the same.

By Mr. Mindel:

Q. There is a statement on the attached page that one should not take more than 10 tablets a day and on the tablet days on the diets it is indicated that one should take two or three tablets every three or four hours. As-

suming he took two each time that would mean that five times during the day he took these tablets accompanied by some liquid. So that would total, Doctor, how many calories on an average for the day?

A. Well, if you consider that the average juice or soup would be about 100 calories and if that were taken five times a day that would be about 500 calories per day.

Q. Well, are there some juices whose calorie value is [124] much lower than that?

A. The juices vary in caloric content as do the vegetables and the soups, depending on what is in them.

Q. I say are there some which are less than a hundred calories per glass? A. Yes.

Q. Can you tell us how many calories would be afforded by a glass of tomato juice?

A. Of course it depends on the size and depends on whether you made it yourself or got it out of a can, but we might—

Mr. Lawson: Or whether it came from California.

The Witness: Or whether it came from California or some other place, and the Chamber of Commerce always has the best figures. But I would say that an average glass of tomato juice would have about 25 calories.

By Mr. Mindel:

Q. Well, how many calories are afforded by these tablets when you take them with the juice?

A. Each of these tablets provides about 2 calories.

Q. Can you tell us now, Doctor, what the average obese person's caloric intake is daily?

A. The average obese person takes in about 3500 to 4000 or more calories per day.

Q. That would mean then that an obese person following the Al Williams course would be consuming how

many less calories [125] than he had been accustomed to consuming?

A. Well, if he were on a 4000 calorie diet and he dropped to a 600 calorie diet there would be a difference of 3400 calories. If he were on a 3500 calorie diet and he dropped to 600 there would be a difference of 2900 calories.

Q. Would that then be an easy diet for the obese person to follow? A. It would not.

Q. Well, what would be the difficulty there? I mean, explain for the record why you say it would not be an easy diet.

A. It is not easy because he is used to taking a lot of food and if you give him a little food he is going to get hungry.

Q. Doctor, on the fore sheet of that plan which you hold in your hand at the bottom, the last paragraph, it says (reading):

> "I know that you will derive a great deal of benefit from this Plan. It is important that you follow all of the instructions: The Bathing Plan should be followed as per directions. REMEMBER that good elimination is VERY IMPORTANT. Try and follow the Internal Bathing Plan, but if you find that you can't take the time to do this then I suggest that you take the ACTIVATORS to bring about good elimination."

And then on the third sheet of this—rather the fourth sheet of this plan under the heading "INTERNAL BATHING PLAN" it reads:

> "I have found from experience that while on a reducing plan, as well as on a body building plan,

an internal bath (enema) taken two or three times a week is of great value, the object in both cases is to clear the system of waste matter. It is not habit forming. Use about a quart of plain water at approximately blood temperature, roughly 97°—

it says here and I assume it means degrees. (Reading continued): [126]

—"After the second or third trial with this procedure the person of average size should be able to easily retain the amount of water mentioned for a minute or two, or even five minutes."

And then there are further directions for taking the enema. What effect, Doctor, if any, would this bathing plan have on the success of the reducing scheme?

Mr. Lawson: Just a moment. I don't see anything charged in the specifications with reference to those particular matters. I object to it on that ground.

Assistant Solicitor: Isn't taking of the enema a part of the plan?

Mr. Mindel: Yes, sir. It says, as I have just read, "I know that you will derive a great deal of benefit from this Plan. It is important that you follow all of the instructions." and then the next instruction is the bathing plan as I have just read.

Mr. Lawson: Even so, assuming that it could be interpreted that particular phase of the plan is a part of the plan, I don't think that we have been advised here specifically of that particular issue just by calling it a general plan. As I read the literature there are parts of that plan that may be adopted and parts may not. It has been left to the option of the purchasers. I think a great

part of it is in the nature of general advice as to what could be done and what couldn't be done. But having elected to mention specific things here which is regarded by the Government as objectionable I don't see why we should be confronted now with [127] other phases that haven't been called to our specific attention.

Assistant Solicitor: What was your question, Mr. Mindel, as to what those—

Mr. Mindel (interposing): What effect, if any—

Assistant Solicitor: —parts of the plan would do?

Mr. Mindel: What effect, if any, would the internal bathing plan have upon the success of the reducing scheme?

Assistant Solicitor: I think the question is competent, Mr. Lawson, and I overrule your objection.

Mr. Mindel: Will you answer please, Doctor.

The Witness: The internal bathing plan either by activators, which I assume are laxatives, or by enema would have no bearing on a reducing plan since it is entirely irrelevant. It would not help bring about reduction of weight except to the extent that an enema would remove a certain weight of fecal material from the intestinal tract.

By Mr. Mindel:

Q. You have testified, Doctor, as to the average daily caloric intake of an obese person and you have also shown the contrast between that and the calories afforded by the Al Williams plan of reducing, and you have stated that the effect would be on the obese person to cause him to be hungry. Would the taking of these so-called food tablets take that hunger away?

A. It would not. [128]

Q. Will you explain why not.

A. Hunger depends upon the contractions of the stomach. The stomach always contracts when it is empty. It is nature's signal to put some more food into the stomach. When an appreciable amount of food is put into the stomach, the hunger contractions cease and the stomach goes into a different type of activity known as digestion. When digestion is complete the stomach is empty and hunger contractions occur once more. The taking of two tablets weighing, as I believe, seven tenths of a gram each would not stop hunger contractions.

Q. You would say then or would you, Doctor, that the foods contained in these tablets in their concentrated form have or have not the effect of eliminating hunger?

A. The taking of these tablets would not eliminate hunger.

Q. In Government's Exhibit 2-C-1, which is a circular of the respondents, there is contained the statement—before we proceed with that question, Doctor, you did hear Mr. Casey and Mr. Eisenberg give their analyses, did you not, of the tablets? A. I did.

Q. And the testimony you have given as to the effects of the tablets up to this point is based upon those analyses, is that correct? A. That is right.

Q. Now, going on to this question, on the back page of that 2-C-1 circular of the respondents, there is contained in the second paragraph this statement (reading): [129]

"You will find that after a few days you will not crave to overeat, and you will feel full of pep and have more energy."

What is your opinion, Doctor, as to that statement?

A. Well, I believe there are three parts there.

Q. First of all "you will not crave to overeat" after a few days use.

A. The craving for overeating which an obese person has will not be dissipated by taking these tablets for three days. Is that what the statement implied?

Q. A few days it says.

A. A few days.

Q. It says, "You will find that after a few days you will not crave to overeat."

A. The taking of these tablets for a few days would not give one pep and energy. Was there anything else to that—

Q. No, it says "You will not crave to overeat, and you will feel full of pep and have more energy." And your answer is that a few days use will not offset the craving and will not leave the person full of pep and with more energy; is that your answer?

A. That is correct. It will not dissipate the craving to overeat, it will not give more energy and give more pep.

Q. Going back to the question which was ruled out previously in the earlier part of your testimony. Now that we have discussed the plan, are there some obese persons who would be harmed by the loss of weight as would be brought about by following such a plan? [130]

A. Yes, there are some obese persons who would be harmed. The diabetic might be harmed. The patient with previous tuberculosis might be harmed. Any obese person who is put on a strict diet may develop periods of hypoglycemia when he would become dizzy and perhaps faint. He might be crossing the street and faint and be hit by an automobile. Those are some of the consequences upon taking a strict reducing diet.

Q. When you say "a strict reducing diet" are you referring to this one which we have under consideration here? A. Yes.

Q. Are you familiar, Doctor, with other weight reducing plans offered to the public involving a reducing diet? A. Yes.

Q. In your opinion would a person who failed to reduce on a plan such as those just referred to be more likely to succeed with the plan of the respondents?

Mr. Lawson: Just a moment. I object to that. It is incompetent.

Assistant Solicitor: I don't think that is a competent question, Mr. Mindel.

Mr. Mindel: It is claimed by the respondent in the representations which he makes that regardless of whether or not the purchaser or the prospective purchaser has failed by any other scheme of reducing which is on the market or which he otherwise has used he will be successful with this plan. [131]

Mr. Lawson: Well, may I ask where in the charges that is alleged?

Mr. Mindel: In the first charge, Mr. Lawson.

Mr. Lawson: I don't see any reference to other plans.

Mr. Mindel: In the first charge, "or failure to reduce by other methods."

Assistant Solicitor: Did you ask about a specific plan; as to whether such specific plan would bring results quicker than this?

Mr. Mindel: No, I say would this plan, would a person who purchases this plan be more likely to succeed in following it than in following any other plan involving a reducing diet that is offered to the public. In other

words, is there anything indicated in this plan which is unique in that the other plans which have been used by the purchaser and which he has failed to succeed on do not contain the same thing.

Assistant Solicitor: Well, we don't know what those other plans are, Mr. Mindel. I think--

Mr. Mindel (interposing): I say other plans—

Assistant Solicitor: —if you had said is this plan unique, is there anything new about this plan, is it novel or new to science, a low calorie diet, it would be a competent question, but we don't know with what we are comparing.

Mr. Mindel: Generally speaking, Doctor, in weight reducing schemes which involve a reducing diet why does the purchaser fail to succeed in its use? [132]

Mr. Lawson: I object to that because I think it is incompetent. I don't see where it bears upon any of the issues.

Mr. Mindel: Well, it leads up to the next question which I am trying to bring out as to wherein this plan has some element which would overrule the reasons for failure in the other plan.

Assistant Solicitor: I think the witness can answer what the difficulties of diet are. Why the patient doesn't always follows the diet prescribed by the doctor or by someone else. I think it is a competent question.

The Witness: The question as I understand it is why people don't follow low calorie diets?

Mr. Mindel: Yes, sir.

The Witness: Because they get hungry.

Mr. Mindel: Well, is there anything then in this plan or is this plan one which that person who has failed

in other plans because he became hungry that he will follow?

Mr. Lawson: I don't quite understand the question.

The Witness: I don't either.

Mr. Mindel: The person who has failed to follow the other plans because he has become hungry, will that reason for his failure be removed in the present plan which we are considering?

The Witness: Well, if you wish to know whether or not the person will become hungry on this plan I would say yes.

Mr. Mindel: He will become hungry on this plan?

The Witness: He will. I believe it even says so on these instructions. It says, when you get hungry do so and so. Certainly [133] he will get hungry if he doesn't eat. There is no question about it.

Mr. Mindel: Well, even this which you refer to as so and so if he follows that will his hunger be removed?

Mr. Lawson: I am at sea without a compass, Mr. Solicitor. I don't quite get the drift of this.

Assistant Solicitor: I think what he is trying to do is to see if this low calorie plan taken in conjunction with the tablets is any different from any other low calorie plan. I think that is what he is driving at. Isn't that what you want?

Mr. Mindel: That is correct.

Assistant Solicitor: Let the Doctor answer that then. I think that simplifies it.

The Witness: This plan is a low calorie diet plus tablets, but it will not accomplish anything that a low calorie diet alone would not accomplish.

Mr. Mindel: So that if the person became hungry on the one plan he would become hungry on this plan. That's what I am trying to get at. And the taking of those tablets would leave him hungry yet; is that correct?

Mr. Lawson: That's pretty argumentative.

Mr. Mindel: Well, that's a conclusion the Doctor can make certainly, a scientific conclusion.

Mr. Lawson: It is a matter of argument I think, your Honor.

Assistant Solicitor: I think you have gone into the question of whether these tablets would relieve him from hunger caused by [134] diet. I think the Doctor testified at length on that, Mr. Mindel, that the tablets would not relieve hunger or eliminate it.

Mr. Mindel: All right, we will go on.

By Mr. Mindel:

Q. Doctor, have you made a special study of creams that are used for their effect on the skin?

A. I have.

Q. When a person loses a large amount of weight, does his skin become flabby? A. It does.

Q. What happens to that flabbiness, Doctor, assuming that the lost weight is not regained?

A. In young people there may be some disappearance of the extra tissues as the individual grows. However, in mature people that flabbiness will remain.

Q. You heard Mr. Casey testify as to his analysis of the massage cream sold by the respondent, did you not? A. I did.

Q. And you will note the instructions for use of this cream which are contained, for one place at least, on Exhibit 5-C-2-C.

Mr. Lawson: What is that number, Mr. Mindel?

Mr. Mindel: 5-C-2-C. That's on the page headed "AL WILLIAMS SYSTEM OF CONDITIONING" and it is subheading "APPLICATION OF MASSAGE CREME." (reading):

"A large jar will last from two to three months. Do not use it to excess. The friction increases [135] circulation, and with the additional minerals and vitamins assimilated by the blood stream in conjunction with the baths, internal and external, many stubborn conditions of the skin quickly give place to that glowing, smooth, natural condition of the 'skin you love to touch.' The Creme should be applied after bathing. To help correct flabby, fat tissue, especially about the neck, double chins, on upper arms, and about hips and abdomen, first apply hot then cold water, always finishing with cold water. Dry skin thoroughly, then apply a small amount of the Creme, rubbing it into the flesh with a rotary movement. Rub the flesh for several minutes after Creme has been absorbed."

Now what effect, Doctor, would the application of this cream in the manner indicated have on the flabbiness caused by the loss of weight?

The Witness: It would have no effect on the flabbiness.

By Mr. Mindel:

Q. Would the effect or lack of effect be the same if this were followed over a long period of time?

A. Well, no effect means no effect.

Q. There would still be no effect after a long period of time, is that your answer?

A. It would have no effect either in a short period or long period.

Q. In Exhibit 2-C, which is a circular of the respondent, in the paragraph dealing with "THE SPECIAL BODY MASSAGE CREME" the last sentence of that paragraph says "It is also beneficial when used as directed to beautify the contour of the throat, bust and upper arms, calves of legs, and thighs. Now, what [136] effect, Doctor, will the application of this cream in the manner indicated have upon those parts of the body as just named?

A. It would have no effect on the contour of those parts of the body.

Q. Reverting now to the tablets. On Exhibit 5-C-2, which is the food plan instructions, which you have in your hand, that is, by another exhibit number, there is contained the statement "DO NOT ATTEMPT TO DIET WITHOUT TAKING THE CONCENTRATED FOOD TABLETS." Now what difference would it make to the patient in following this whether he took the tablets or not? A. It would make no difference.

Q. If the person should reduce his weight to normal, assuming that he is down to normal now, would the taking of these same tablets cause him to remain physically fit?

A. Physical fitness is so broad a term that I know of no substance that will keep a person physically fit.

Q. Would you call these tablets a general tonic?

A. I would not.

Q. Why do you say that, Doctor?

A. Well, I know of no substance which is a general tonic because a tonic is something that is supposed to keep a person healthy and I know of no substance which will keep a person healthy.

Q. Will this particular product keep a person healthy?

A. These tablets will not keep a person healthy.

Q. Doctor, does the testimony you have given here today [137] represent the consensus of modern medical opinion? A. It does.

Mr. Lawson: Just a moment. Could that be withdrawn for the purpose of an objection now?

Assistant Solicitor: Well, if you move to strike it.

Mr. Lawson: Well, I move to strike it. That is too broad a question. I think it is incompetent. Certainly there's no foundation laid. I don't think it is a proper question.

Mr. Mindel: Well, he is put on here as an expert, Mr. Solicitor, and any expert certainly is supposed to represent, if his testimony is competent at all, the best opinion in his field, and naturally the best opinion will be the consensus.

Assistant Solicitor: I think the Doctor can state whether in his opinion the thought that he expresses upon the subject of diet is modern scientific thought, and he doesn't want to say that every doctor, take some of the oldtimers, for instance, might agree with him or that all the new doctors do, but he can say that it's the modern scientific thought as he knows it and whether as he knows it it's the modern scientific thought.

Mr. Lawson: If I understand correctly the limitations of expert opinion it is restricted to the particular community in which the expert practices and as reflecting the opinion of those who practice in that community on a comparable scale with the witness. And I don't think that it is pertinent or proper merely because of the fact that a particular witness might have [138] the qualifications

to testify as to what those might testify to, if produced, who practice to the same extent in the same community that he does would justify an opinion that would extend farther than that. In other words, his opinion as an expert is limited to the particular field in which he practices.

Mr. Mindel: Of course it is limited to the particular field in which he practices and that's how we qualified him. As to whether he is restricted to a particular local community, certainly medical science is not a local geographically separated science. The best opinion of all medical science development is always disseminated for the benefit of all the members of that science, all the doctors. The Doctor has said he has made a special study of the subjects involved here and therefore that necessarily involves a study of the best medical opinion.

Assistant Solicitor: I don't think scientific thought upon any particular question, particularly one of obesity —one like obesity—and what scientific thought is upon the question of treating obesity and the like, I don't think it should be limited to the Washington, D. C., area where the Doctor lives. Scientific American thought is disseminated in medical journals and the Doctor reads all those and evaluates them and he reaches the conclusion as to what the modern consensus is upon the question. I think it is a competent question as to whether he has given testimony based on modern opinions, whether they represent the consensus of medicine as far as he understands it. You may answer the question, Doctor. [139]

The Witness: I believe I have answered it already.

Assistant Solicitor: Yes, he did. The motion was to strike. Well, I overrule the motion to strike.

Mr. Mindel: That's all the questions I have at this time, of the Doctor.

Assistant Solicitor: Would you like a short recess before you start cross examining, Mr. Lawson?

Mr. Lawson: Yes.

(Short recess taken.)

Mr. Mindel: I would like to ask one more question of the witness.

By Mr. Mindel:

Q. This hunger that results from following the diet as your have testified, would that result in discomfort to the person following it?

A. Yes, hunger contractions are painful contractions of the stomach.

Q. Would the low calorie intake cause any other uncomfortable symptoms?

A. Well, as I have mentioned before, one can get hypoglycemic reactions in which the blood sugar become low and one may become dizzy and faint.

Mr. Mindel: That's all. You may cross examine now, Mr. Lawson. [140]

Cross-Examination.

By Mr. Lawson:

Q. Dr. Putnam, how many cases would you state, approximately, of obesity that you have treated?

A. Well, it is always very difficult to tell the number of patients that I have treated. For example, in working in an out-patient department of a hospital one sees a patient with obesity, the following week that patient may see another physician and three months later that patient may be seen again by the first physician, that is, myself. I don't know whether you would consider that

my patient or the other man's patient or half a patient for me, but I would certainly say that I have seen many hundreds of patients with obesity concerning whom I have had something to do at some time or other.

Q. Can you give us approximately the number of patients that you have treated specifically for obesity? By that I mean that you personally have treated for that particular condition.

A. You mean in which no other doctor has had a hand?

Q. That is right.

A. I don't know why you would want to exclude those people.

Q. Well, I am asking this first, I would like to know how many particular cases you have treated.

A. I would say several hundred certainly.

Q. Several hundred? A. Certainly. [141]

Q. People that have come to you for the single purpose of having that condition treated?

A. Well, you see they don't come to me. If I am working in the out-patient department of a hospital they come to the hospital.

Q. Yes. I don't want to be impolite. I think you have already testified to that. But what I am trying to find out is how many people in your practice as a physician have you treated for obesity; that have come to you as a physician and they have said "I have an obese condition and I would like to receive some treatment," and you have treated that particular patient.

Mr. Mindel. Just a minute. I think the question is incompetent because I am sure the Doctor will testify that there are many instances where he treats the patient not only for obesity alone but for another cause in con-

nection therewith and to break them off and exclude those which have obesity and some other condition certainly wouldn't be giving a fair answer.

Assistant Solicitor. Nevertheless that wouldn't make the question incompetent. The question is competent to ask him how many patients he has treated in his own practice I assume the question means.

The Witness. I was just going to ask you if you meant in my private practice as opposed to my teaching clinics and hospital work.

Mr. Lawson: Yes, in private practice. We will take first [142] your private practice.

The Witness. In my private practice I would say it would probably be under a hundred.

By Mr. Lawson:

Q. Well, is that the best approximate figure that you can guess?

A. I think so. I could say it would be in the dozens.

Q. You say it would be in the dozens?

A. Yes

Q. Would you say that it was more than a dozen?

A. Oh, certainly more than a dozen.

Q. When was the last case you treated as a private physician? How long ago?

A. How long ago? I saw a patient last night that's on a reducing diet.

Q. Your patient? A. Oh, yes.

Q. As a private physician? A. Oh, yes.

Q. How many within the last year have you treated for that condition?

A. Well, I believe I have a half dozen under my care right now. I think it would probably be around a dozen within the past year.

Q. Are you now testifying as to cases that you have treated [143] as a physician in private practice; or are you referring to those whom you may have observed or in connection with your clinical work?

Mr. Mindel: I object to the question.

The Witness: I don't understand the question.

Mr. Mindel: I believe the Doctor has very clearly qualified himself and has described in very clear details just where he derives his experience and his special study of obesity: I don't see the point of filling the record with the prodding of him on this subject when he has made it so clear.

Assistant Solicitor: I think it is a competent question, Mr. Mindel.

Mr. Mindel: But hasn't he answered these questions heretofore, Mr. Solicitor, and isn't it in the record?

Mr. Lawson: He stated several times that he has observed some cases in connection with his clinical work and I am just trying to find out if this dozen cases is within his practice as a private physician or in connection with his clinical work.

The Witness: Well, I believe that you limited me entirely to my private patients and that's what I am talking about.

By Mr. Lawson:

Q. In your treatment of patients for obesity, do you use a diet treatment? A. Oh, yes.

Q. And as an internal medicine physician do you prescribe at any time the use of drugs— [144]

A. Oh, yes.

Q. —In connection with the treatment of obesity?

A. I don't know what you mean by "in connection with." I have one patient who is obese and had her

thyroid out and she has myxedema and she gets thyroid. She doesn't get the thyroid in connection with the obesity, she gets the thyroid in connection with her myxedema. She gets a diet for her obesity.

Q. Do you use drugs to any extent for the treatment of obesity?

A. I do not use drugs in the treatment of obesity.

Q. It is all a matter of the regulation of diet? Or chiefly so? A. You mean in my practice?

Q. Yes, in your treatment.

A. In my treatment it is diet, yes.

Q. And you have stated that reduction in weight is accomplished by the reduction of caloric intake?

A. That is right.

Q. And that when the caloric intake is reduced would that necessarily accomplish reduction in weight?

A. That is right.

Q. Now, I think that you have also stated that it is the contraction of the muscles in the abdomen that creates hunger?

A. No, sir, it is the contraction of the stomach. I might point out that the average individual confuses the stomach and the [145] abdomen. The abdomen is the large—

Q. (Interposing.) With that modification. It's the contraction of the stomach muscles that creates hunger?

A. Yes, but the stomach muscles are the muscles of the stomach inside the abdomen. This is the abdominal wall of the front part of the body (indicating) and those muscles are not the stomach muscles although the average layman calls them his stomach muscles.

Q. With that explanation the statement you have made is that it is the contraction of the stomach muscles that creates hunger? A. That is correct.

Q. Is it a fact in your opinion that by the permanent contraction of the stomach muscles the desire for food is restricted accordingly?

A. I don't know what you mean by permanent contraction.

Q. Well, I mean reducing the size of the stomach, doesn't that lessen the hunger pang or desire?

A. I don't know how you would reduce the size of the stomach.

Q. You don't know that it ever is reduced?

A. Oh, yes, it is sometimes, surgically. They take out a third of it or two-thirds. That would reduce the size of the stomach.

Q. But that could only be accomplished surgically?

A. No, there are other ways. The size of the stomach can change. A child can grow and the stomach can become larger, and [146] I suppose on a starvation diet all the tissues of the body may shrink and the stomach may become smaller; all the organs may become smaller.

Q. When the stomach becomes smaller the desire or hunger for food is correspondingly diminished, is it not?

A. Oh, no. No, I think the hunger might be greater if you are on a starvation diet. I am sure the people in the prison camps in Japan were very hungry.

Q. Yes, but that isn't what I—

Mr. Mindel: I object, Mr. Solicitor, to the witness having his answers cut off by counsel. I think he should be allowed to finish his sentences and his statements.

Mr. Lawson: I think that is correct. I didn't mean to—I am trying to get information, I am not trying to argue.

The Witness: Yes.

By Mr. Lawson:

Q. As I understand it, and you may correct me, that when the size of the stomach has been reduced—and I am not speaking surgically but the contractions about which you have spoken—that the hunger instinct or demand is lessened?

A. I perhaps have not made myself clear when I said contraction of the stomach. I didn't mean any slow process of contraction. A hunger contraction is something that I can best illustrate by using my hands which won't show on the record, but this is a contraction when I close my hands, when I squeeze down on something, that's a contraction, and that is what the stomach [147] does. It is like a balloon deflating, then inflating, then deflating, then inflating. When the balloon deflates it is a hunger contraction and it is only momentary. One could draw a curve. One usually does draw curves experimentally by putting a balloon into the stomach and then attaching what is called kymograph. A kymograph is a writing record and that is attached by means of a tambour to the air inside of the balloon and whenever the stomach contracts the tambour—the rubber on the tambour moves and a writing lever draws a diagram on the kymograph. And if you would see the recording of the stomach contractions you would see that they take place every few seconds and then relax within a fraction of a second. They are continuing squeezings of the stomach. It is not a contraction of the whole stomach that stays down. I hope I have made myself clear.

Q. If a person has been put on a reduced diet for any particular period of time will the size of the stomach shrink?

A. To the extent that his body shrinks, yes.

Q. After it has reached that shrunken state will the requirement of food be the same, less or greater than it was before it was shrunken?

A. The requirement for what, for existence?

Q. For food.

A. Food for existence or for good health.

Q. For hunger or for the satisfaction of whatever hunger requires. [148]

A. Well, a person who has starved will be hungry and he will need food.

Q. I don't want to interrupt you but I think that you can answer that question. If I haven't made it clear I will restate it. If the stomach has been shrunken—

A. Well, the stomach doesn't shrink much.

Q. Well, have you not testified that it does shrink after the volume of food has been reduced—the intake?

A. Yes, I said it shrinks to the extent that all the organs in the body will shrink. The whole body shrinks if you are starving. It is not much of a shrinkage as far as the stomach is concerned.

Q. Then the contraction about which you speak is merely the ordinary contractions of the muscles in the daily consumption of food?

A. The contractions about which I speak are the contractions of the stomach which produce hunger pains. They occur when the stomach is empty.

Q. Now, as I understand your testimony you believe that anybody who may be obese should first consult a physician if he desired treatment. Is that your position?

A. I think that is the sensible thing to do.

Q. Well, you say sensible thing, you think that should be done, don't you?

A. I certainly think that we should be sensible.

Q. And you do not believe that any treatment without the [149] advice of a physician is a proper treatment?

Mr. Mindel: I object to the generality of the question. I think it should be made specific with regard to obesity.

Mr. Lawson: Well, let us understand—

The Witness (interposing): I was just about to ask you whether you meant treatment for obesity.

Mr. Lawson: Yes. We will restrict it to that because that's what we are interested in.

The Witness: As I said before the sensible way would be to have medical supervision.

By Mr. Lawson:

Q. And that if treatment is not administered under the advice of a physician that it isn't a safe treatment?

A. It may not be safe.

Q. Well, I am speaking now generally. Any method of self treatment is not in your opinion safe?

A. For obesity?

Q. That's right. A. Yes, it may not be safe.

Q. You say it may not be safe but isn't it a fact in your opinion that under no circumstances is it safe?

A. Well, I know for a fact that many people never consult a physician and do reduce and are not harmed by it. That's why I say it may not be safe rather than it is not safe.

Q. Then in your opinion, Doctor, it could be that some [150] of the people who purchased this plan and preparation were benefited, were reduced in weight safely?

A. I don't know of anybody that has bought that plan but so far as I know they might have and reduced safely.

Q. And in giving your opinion here today have you made any effort to determine how many people have stated that the plan and preparation have benefited them?

Mr. Mindel: Objection. I don't think it is within the province of the Doctor's work to make such an investigation. I don't think he should be called upon to answer such a question.

Assistant Solicitor: I don't think that's a competent question for an expert witness, Mr. Lawson.

Mr. Lawson: Have you ever had any experience, Doctor, outside of the practice of your profession as a doctor, had any experience in a general health conditioning like in connection with exercising, gymnasium or anything of that kind?

Mr. Mindel: I object to the question. There is no exercising involved in the case here, Mr. Solicitor. There is no charge in connection with exercising and the witness hasn't qualified as an expert on the use of exercise.

Assistant Solicitor: Well, I think any doctor would be qualified to state the benefits or disadvantages that might occur in exercises but I don't, Mr. Lawson, see how that question is relevant unless there is something about exercises in his plan. I haven't read the plan but I have heard nothing said about exercises.

Mr. Lawson: There was a chart I think referred to called [151] the "Magic Chart."

Mr. Mindel: Sir?

Mr. Lawson: The "Magic Chart."

Mr. Mindel: Oh, you said chart. I beg your pardon, I thought you said charge.

Mr. Lawson: Chart.

Mr. Mindel: That's right. But that isn't covered in our charges.

Assistant Solicitor: Well, is it a part of the plan?

Mr. Mindel: It is not an essential part of the plan and it is not offered as such. The prospective purchaser is told that if he does not care to follow the exercises he doesn't have to. Therefore, we didn't include it in the charges.

Assistant Solicitor: Wasn't the same thing true of the enema?

Mr. Mindel: No, sir. With regard to the enema it said, "It is important that you follow all of the instructions" and then the next words are "the bathing plan should be followed."

Assistant Solicitor: Well, I think if exercise is a part of the plan even at the option of the purchaser of the plan he is entitled to ask questions about it. I overrule your objections, Mr. Mindel.

The Witness: I have had some experience with exercises. I have taken exercises. When I was in high school I was on the track team and on the swimming team and I was finally captain of the swimming team in high school. I swam in [152] several meets in college and as a physician I have been a first aid instructor of the Red Cross for many years.

By Mr. Lawson:

Q. And I am assuming that in your treatment of obesity that you advise your patients to take a certain amount of exercise to burn off the caloric intake.

A. I don't usually.

Q. Well, is it a safe and sensible part of any plan for reducing to recommend that type of exercise that might be suited to the particular individual?

A. It is always safe to recommend something that is suited but it may not be suited for an obese individual to exercise.

Q. But quite generally speaking that is a part, is it not, of any reducing program?

A. Generally speaking it is not a part of any reducing program.

Q. I think you stated, Doctor, that the contractions of the stomach muscles caused by hunger become painful?

A. They are painful, yes.

Q. And to an acute state?

A. Well, I suppose you mean severe when you say acute.

Q. Yes.

A. Physicians talk about acute meaning a short space of time as opposed to chronic. If you mean, are hunger contractions severe?

Q. Yes. [153]

A. I would say yes. They may be mild, moderate or severe. In other words, you can be slightly hungry, or a little bit more hungry, or you can be very hungry. If you are very hungry you have severe contractions.

Q. Now, you are familiar with the plan and the preparation involved in this case?

A. I have read the directions and the diet instructions, the enema instructions and so on.

Q. Now, in your opinion if a person purchased the preparation and plan and used them, would these pangs become severely painful to him? A. They may.

Q. I mean, what is your opinion?

A. Well, the directions say if you get hungry take two tablets and a glass of water.

Q. I think you can answer that question directly, Doctor. You have testified as to the caloric content of the tablet in question, you are familiar with the diet plan, and every other phase of the plan. Now, I am asking you, if that plan were followed would a person suffer severe pains in the stomach? A. He might.

Q. I am asking you directly in your opinion what would—

Mr. Mindel (interposing): I object, Mr. Solicitor, to the restriction of the question to severe hunger pains. We have charged concerning hunger and there is no mention of severe hunger pains. [154]

Assistant Solicitor: Well, I think the Doctor has answered the question when he says it might. We can infer from that he means not in all cases but that it might in some.

The Witness: That is absolutely correct.

Assistant Solicitor: That's what I understand by him saying it might.

By Mr. Lawson:

Q. In your opinion what would be the probable effect in the general average cases of people who might use this preparation and plan as to whether or not they would suffer severe pain?

Mr. Mindel: I think he has already answered that, Mr. Solicitor.

Mr. Lawson: Well, I am asking him as an expert.

Assistant Solicitor: Let him answer that question.

The Witness: That is a difficult question to answer when you ask me about average cases. I don't know what an average case is. We all differ so that if you want to get average heights and average weights you can do that. Write down the numbers and divide by the number of people. If you want the average colors of our eyes you wouldn't be able to tell that without knowing a lot more about light than I do.

By Mr. Lawson:

Q. Now, Doctor, to refresh your recollection, you have unqualifiedly stated that these tablets would not eliminate hunger. A. That is correct. [155]

Q. You have made that without any qualification.

A. That is right.

Q. Now, I am asking you, by the use of these tablets in connection with the plan as to whether or not there would exist this severe pain on a general average; as an expert what would you figure would be the result?

Mr. Mindel: Well, it seems to me, Mr. Solicitor, that he has asked and had an answer to that question at least three times now. It is becoming repetitious here.

Assistant Solicitor. The Doctor said he didn't know what to consider as the average. Did you not state that, Doctor,

The Witness: Yes.

Assistant Solicitor: He doesn't know the average.

The Witness: People vary. Some would have severe pain, some would have moderate pain, and some would have mild pain.

Assistant Solicitor: Are you speaking of hunger pains?

The Witness: Yes. And what is the average of mild, moderate and severe? I suppose the average would be moderate, but that doesn't mean anything.

Mr. Lawson: Well, I don't like to appear to be too persistent but I do believe that when the witness has stated so unqualifiedly that the use of these tablets will not eliminate hunger without any restriction or any qualification that he could give as an expert his opinion as to what would be the effect generally speaking if the preparation and plan were followed. Had he—

Mr. Mindel (interposing): Hasn't he stated— [156]

Mr. Lawson: —testified the other way, why, probably it wouldn't be competent but I think—

Mr. Mindel (interposing): But Mr. Lawson hasn't he testified that the effect would be that the person would be hungry, would remain hungry?

Assistant Solicitor: Well, he can also state whether it would reduce the person.

Mr. Mindel: He is speaking right now of pains. Aren't you, Mr. Lawson?

Assistant Solicitor: Are you still on the subject of pains?

Mr. Lawson: Yes, I am still on the subject of the hunger pangs.

Assistant Solicitor: And was your question as to whether the average person would suffer severe pain?

Mr. Lawson: That is right. That was the first question.

Assistant Solicitor: Well, he has testified that he doesn't know what to consider as the average person. He said some would have slight, some would have moderate and some would have severe pains. Well, I would take from that if you put them in three classifications that the

average would not have severe pains. If it is going all the way from slight to severe we can assume from his answer that the average person wouldn't have severe pain, and let's so assume. I think that answers your question, doesn't it?

Mr. Lawson: No, I don't think it does. [157]

Assistant Solicitor: Well, let's see if you can word it another way. I want to get it in here if you want it in here.

Mr. Lawson: Am I correct in understanding your testimony to this effect, Doctor, that the use of the tablet in the manner advertised, which is as you have stated, will not eliminate hunger?

The Witness: That is what I said. The tablet will not eliminate hunger.

By Mr. Lawson:

Q. And that therefore by the use of those tablets in connection with this plan there would exist hunger?

A. The tablets would not produce the hunger. No, not by the use of—

Q. (Interposing): By the use of them under the assumption that it is food value would create hunger.

A. No, hunger is created when the stomach is empty.

Q. Well, I've put it as simply as I can. If I understand you correctly you are trying to state here that the use of these tablets will not satisfy hunger in any capacity at all.

A. Well, I don't believe I said that. I said that the tablets will not eliminate hunger pains. Now, if you want to know whether they would satisfy hunger to any extent I would say yes, that they will satisfy it to an extent. They will satisfy it to the extent of two calories and two calories to a person who normally takes 4,000 is some-

thing like dropping an ounce of water into a bathtub that is full. You would not notice the difference. [158]

Q. And you are basing that entirely upon your statement that the tablet has approximately two calories?

A. It has approximately two calories plus a certain bulk. It has a certain size. I have seen the size of the tablets and I know what is in them, and from my knowledge of the calories and the bulk I would say that it would have no appreciable effect upon hunger and would not eliminate hunger pains.

Q. Now, assuming hypothetically that the users of this preparation and plan have not complained about any hunger pains and have stated that it takes away the hunger, would your opinion still be the same?

Mr. Mindel: Objection. Certainly the statement just made is not competent testimony and it shouldn't be brought in by the question of the counsel. A layman couldn't give expert testimony in a case, in this case certainly, so as inferential testimony by means of the question of counsel I think is incompetent.

Assistant Solicitor: Well, counsel isn't testifying and I recall that the Government frequently asked the question about the value of testimonials and I take it that's just what Mr. Lawson is asking, what is the value of testimonials from a scientific standpoint. I rule that he can answer the question.

The Witness: I would say that testimonial had no value and I can tell you why it has no value. An individual who takes two tablets with a glass of soup or a glass of fruit juice or a glass of buttermilk or skim milk and then has disappearance of [159] hunger pains does not know whether the hunger pains disappeared due to the effect of the tablets or to the effect of the juice or milk or soup

that went with it, or to both. He doesn't know anything. All he knows is that the hunger pains went away, if they did. To determine whether or not the hunger pains were eliminated, if they were, by the tablets one would have to set up a control experiment and a scientifically controlled experiment can be done in any laboratory by the use of a kymograph that I mentioned and the balloon in the stomach and so on. One could really find out the effect of the various things that are put into the stomach on hunger contractions that way.

By Mr. Lawson:

Q. Well now, as I understand your testimony, you totally disregard any layman's statement.

A. I disregard it if it is wrong, and I believe their statement is wrong.

Q. Well, you don't take their statements into consideration?

A. I certainly always take my patients' statements into consideration because they may be correct. I evaluate them. I listen to them and evaluate and if there is a possibility of their being right I give them that credit, but if they are probably wrong I say so.

Mr. Lawson: No further questions.

Mr. Mindel: I would like to ask one or two. [160]

Redirect Examination

By Mr. Mindel:

Q. If the tablets, Doctor, were taken as it is indicated that they may be with water, what effect would that have in dispelling hunger pains? A. Practically none.

Q. You have indicated that there is a possibility, or I believe you have, that if one takes these tablets with

fruit juice or buttermilk or the others the hunger pains might disappear.

A. Yes, they may.

Q. Is that a temporary effect or is that a lasting effec? A. Of course it is temporary.

Q. And will you define what you mean by temporary in that regard?

A. Well, it is temporary until the stomach becomes empty and then you have hunger pains again.

Q. And how long ordinarily would that take?

A. Well, it depends on the amount of food that is put in and the type of food.

Q. Well, the person is hungry because he is following this diet, we'll say, and therefore he takes the two tablets with a fruit juice. Now, under those conditions how long will it be before he is hungry again?

A. As soon as that fruit juice is out of the stomach [161]

Q. And can you say how long that would be?

A. Well, it would vary with each fruit juice.

Q. Would you say it would remain there until the next full meal?

A. Probably not. It probably would be out within an hour.

Q. And if such an effect is made is it made by the tablets or is it made by the accompanying liquid?

A. It is made by the fruit juice.

Mr. Mindel: No further questions.

Mr. Lawson: No further questions.

Mr. Mindel: Thank you, Doctor.

(Witness excused.)

Assistant Solicitor: Is that the Government's case, Mr. Mindel?

Mr. Mindel: Yes, sir, it is.

Assistant Solicitor: The Government rests?

Mr. Mindel: Yes, sir.

Mr. Lawson: May I have about five minutes?

Assistant Solicitor: Yes, sir.

(Short recess taken.)

Mr. Lawson: Mr. Williams, will you take the stand. [162]

Whereupon,

AL WILLIAMS,

called as a witness for and in behalf of the respondents, and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lawson:

Q. Please state your name.

A. Al Williams.

Q. You live in Los Angeles, California?

A. Yes, Los Angeles.

Q. The parties in this suit have been designated in different ways. Will you please explain the significance of each one of those; the first is AL WILLIAMS, that is you personally?

A. That's myself personally, yes.

Q. Then AL WILLIAMS, HEALTH CONDITIONER.

A. It is the way I sign my letters.

Q. In connection with what particular business?

A. Well, that is with the food department and also in my personal business department.

Q. Then the next, Al Williams, Physical Conditioner.

A. That's another title I use from time to time.

Q. Is that description used in connection with your business as the manager of a health establishement?

A. Yes. [163]

Q. Which consists of baths and exercise?

A. Yes, and massage, ultra violet ray, and natural condition methods.

Q. Then Al Williams Health System, what does that signify?

A. That's a trade name that I have built up over a period of years and which has been used in San Francisco and Oakland. You see that is my system that I have devised and it is used by different parties there.

Q. Do you use that in connection with the sale of the tablets and the plan in question?

A. Yes. I use that with the health system, with the tablets.

Q. Then The Al Williams Health System, and Williams Health System, at Los Angeles.

A. Well, that's the name of the corporation, The Al Williams Health System of Los Angeles, Incorporated.

Q. Is that a corporation?

A. That is a corporation, yes.

Mr. Mindel: I might say, Mr. Lawson, as a matter of explanation that "at Los Angeles" means to apply to all the names above it.

Mr. Lawson: I am trying to clear up if possible the use of the names and how it applies particularly to the preparation and the plan here in question.

Mr. Mindel: Well, may I say that we found those names used in one part or another of the literature which was received in the test correspondence conducted in this case in connection [164] with the sale of the plan that has been discussed already and is under charge here.

By Mr. Lawson:

Q. Mr. Williams, will you state briefly your experience as a health conditioner.

A. Well, I have made that stipulation already there.

Q. Well, for the purposes of the record just state it.

A. Well, in 1906 I started as an athlete; boxing and wrestling, up to 1916 as a professional. From 1916 I was an instructor at the Olympic Club in San Francisco, of the wrestling team. At that time the war came on, the First World War, and I invented a system of rifle disarming for self defense purposes, and I came here to Washington and I gave a demonstration before the War College. The matter was so impressive that they sent me to the Fort Sill, Oklahoma, School of Arms. I was there for a period of time and from there I was sent to Camp Borden, Georgia. Then from Camp Borden, Georgia, to the Presidio and in the meantime the war came to an end. Then I went back to the Olympic Club and I resigned then and went into business for myself.

Q. What kind of a business?

A. Natural conditioning business. Applying the system that was used in the Army, modification, to business and professional men of San Francisco.

Q. And a little more specifically, what did that consist of? [165]

A. Well, it consists of a physical checkup of the individual's condition, and then give him exercises and nu-

tritional changes and general natural measures to bring about an improvement of the physical body; mental and physical advice in coordination to bring about a change for the better by natural methods.

Q. Your first establishment was in San Francisco?

A. 1920.

Q. Did you have any other establishments?

A. Yes. I had one in Oakland, one in Pasadena, and three in Los Angeles.

Q. Three in Los Angeles? A. Yes.

Q. Over what period of time?

A. Those establishments I kept them from 19—The Los Angeles branch was opened up in 1927, then in 1930 the Roosevelt and Pasadena branches were opened up, and in 1931 the Ambassador branch. Then the depression came on and I began to shrink up until now I only have just one esablishment.

Q. And that is located where?

A. At 541 South Spring Street, Los Angeles.

Q. Now, over the period of time that you have conducted the business which you have described, how many men would you say that you have treated or put through the measures you have for health conditioning?

A. Oh, safely over 50,000, because at one time our organization [166] was composed of almost 250 employees.

Q. How many employees? A. 250.

Q. Did you take an active part in the management of the business?

A. I always have. Not only in the management of the business but in the actual conditioning part of it, advising suggestions by plans of improvement you know to bring about improvement of the physical base.

Q. In the conduct of that business did you have occasion to be interested in weight reduction?

A. Oh, yes, because practically between 75 and 80 per cent of all the people who wanted to improve their physical base was due to the ambition to lose weight.

Q. When did you become particularly interested in weight reduction?

A. Well, I always was interested because that's one of the problems of all athletes to keep the weight down. I studied weight reduction from the time I was a professional athlete, and to find ways and means to bring about reduction by the most easy way and the most sensible way without losing strength. Take for instance when you have to make weight as some of the boxers and wrestlers have to do, we must use different types of food to bring about a reduction without losing the energy to carry on through the wrestling match or boxing bout. And naturally through those periods of [167] years I have learned many plans which help to decrease the weight and increase the energy by selective foods and selective nutrition.

Q. When did you first become interested in concentrated nutrition?

A. About 1935. At that particular time concentrated nutrition came to the fore, just gradually, and it was brought to my attention by newspaper items. It seemed to appeal to me because there always has been a problem to keep the discipline of eating among the clients. When we make a revision of food analysis, of which I have made over 50,000, they give me their habits of eating and then when we make the changes there was always a hardship for them to follow the change because of the

hunger feeling and desire. So when concentrated nutrition came into vogue the particular thing that inspired me most was that I read an article in the paper that a local chemist there had devised a tablet for Captain Byrd to go to the South Pole or North Pole. I forget which one now, and the notice said it would not require so muc' space. That kind of made me inquisitive about concentrated nutrition so I looked up some of the people who at that time were in that particular business and I began to experiment myself with concentrated food formulas. Oh, I experimented for, on myself personally, on my own body, probably about two years, from 1935 to 1937, with amazing results. I go on fasts. In fact, I went on a fast one time for thirteen days by only taking the tablets in water and I played two games of handball at the end of the thirteenth day. That proved to me that there was some value to the tablets. [168] Then I experimented with the tablets by eating one meal a day and then the tablets. Then again two meals a day and the tablets. Over the period of time I derived conclusive proof within myself that there was a good deal of value to concentrated nutrition. And I experimented in my own family. In fact, my mother-in-law what at the time she was sixty-eight years of age had lost all the desire to walk or do anything of that type so I changed her food plan and made her eat some of those tablets and amazing as it may seem she got some of her energy back, some of her ambition, and now even to this day she goes downtown at seventy-eight.

Mr. Mindel: I object to that sort of testimony, Mr. Solicitor, where Mr. Williams is trying to testify as to the effects of these tablets upon his mother-in-law or anyone else. He has not qualified as a medical expert

and certainly he can't testify as to what effects were brought about by these tablets in their use.

Mr. Lawson: That goes to the weight, Mr.—

The Witness (interposing): I was experimenting then.

Mr. Mindel: I understand. But certainly Mr. Williams is not by any means qualified as a medical expert to testify upon the efficacy of any preparation.

Mr. Lawson: He is not testifying as a medical expert.

Mr. Mindel: He has stated as his conclusion that his mother-in-law by the use of these tablets had a revived energy; that she was lethargic prior thereto but when she used these tablets she has surprising new energy, and that certainly is a conclusion which he is unqualified to make. [169]

Assistant Solicitor: Mr. Lawson, here in the department we have testimonials offered in these cases by the operator of various businesses selling medical preparations through the mails, testimonials to prove anything—I mean that will assert anything about any medicine that is put on the market—and if we consider them of no value whatever in the place of medical testimony they would be of no value in the record, and there was a recent case here in the District of Columbia where the court held that we properly refused to admit testimonials. Well, isn't the testimony of a lay witness just the same as to the effect of any medicine of concentrated foods?

Mr. Lawson: Not in my opinion if it is the result of direct experience by one who is qualified in the general field of health conditioning. I don't know if a physician could be considered in some cases. I have no particular

reference here of course, but there are some medical men whose field would be entirely apart from anything connected with physical activity and the effect of foods and exercise upon the human body than perhaps one who had large experience in that particular field might be more qualified. The matter of expert opinion—the admissibility of that testimony has been widened lately and the only question will be the weight to be attached to it. That's up to the trial court or whoever sits in judgment on it. But that's the general trend I would think of all of the decision. I am not so familiar with those decisions, naturally, as you are, but I think in some of the circuits they are [170] accepted; testimonial letters are accepted in the absence of proof that they are not false.

Assistant Solicitor: Well, it has been an invariable rule here since I have been here in the Department—I have felt that way about it—that testimonials can be of no value because they are testifying to the efficacy of some drug or some tablet or some plan for the treatment of a physical condition about which the layman knows nothing. Take an arthritic for example, he will give a testimonial that he is much improved, he has taken such and such a preparation. The medical testimony will show that the symptoms of arthritis come and go. That's rather an extreme example. He doesn't know if the preparation had any effect whatever. Nature might have taken care of the situation. We stray from the testimony of those qualified in the field of science. In this case we consider caloric values and what caloric values in food there must be to sustain one. I think the Doctor has already testified that the diet is a reducing diet. I don't think there is any question about that being a reducing diet. But when you come down to a scientific question as to the food

value of these tablets I cannot conceive though that he would be qualified to testify concerning them, as to their efficacy. I have heard a good many cases since I have been here on the question of those who are competent to give such testimony who are qualified, I don't want to be arbitrary about this matter but if you have got any authorities that show me to be wrong about [171]. this I will be very happy to hear them. But we frequently have this very situation where the respondent has read a few medical books and attempted to evaluate the statements made in them and we say to give an opinion on a medical question he must be qualified to give such opinion, have a scientific background. So at least nothing yet has been said by the witness or offered to qualify him as an expert medical witness and this is certainly a medical question; I will be glad to hear from you further on the subject.

Mr. Lawson: Well, I assume that it will be merely a matter of weight rather than admissibility. If that is your ruling, why, that's that.

Assistant Solicitor: That is my invariable ruling here, Mr. Lawson. If I relaxed the rule in your case I would have to relax it in all, but that is my invariable ruling about laymen testifying concerning medical questions. Now, you have the same opportunity as the Government has—any respondent has—to introduce medical testimony and it is frequently introduced here. That isn't denied you. But we can't accept an unqualified statement from an unqualified witness concerning such matters.

Mr. Lawson: Well, all I can say is that with the time at our disposal I doubt very much whether we would have time to get medical opinion.

Mr. Mindel: Naturally he had an opportunity, Mr. Solicitor, to ask for a continuance if there were difficulty in obtaining the medical testimony that he would desire. That is a well known procedure which is taken advantage of my most attorneys, I might say, who are [172] assigned cases before this office. No request was made upon this office for a continuance for that or any other purpose, and it certainly would have been granted had it been asked.

Assistant Solicitor: Well, I sustain Mr. Mindel's objection for the reasons I have stated, Mr. Lawson.

Mr. Mindel: May I interrupt for a recess for just five minutes for a necessary call.

Assistant Solicitor: Yes.

(Short recess taken.)

By Mr. Lawson:

Q. Mr. Williams, in your experience in the conduct of your business as a health conditioner in the establishments to which you have referred, did you have occasion to experiment with those who patronized your establishments with the tablets here in question?

A. Oh, yes. After I found out they were of value to me I just simply began to try to cut down on eating bulk food and give them concentrated nutrition.

Q. To what extent would you state that you have experimented with those tablets?

A. I experimented, as I said before, before I put it on the market for about three years. When I saw the benefit from them then I began to sell them by mail.

Mr. Mindel: I didn't get that last answer, Mr. Williams. I couldn't hear your last answer. [173]

The Witness: For about three years I experimented with clients that came to my gymnasium and after I found out the value instead of eating a lot of bulk to eat concentrated tablets to bring about better results and satisfy their hunger then I began to go into the mail order plan.

Mr. Mindel: Well, I object to that answer being accepted into the record on the same premises as my previous objection as to the effect of these tablets with the people whom he had under his care.

Assistant Solicitor: Hadn't we at this point let him do what was done in the case of the medical expert offered by the Government; determine once and for all by direct examination and cross-examination just what the qualifications of this witness are. So I would if I were you, Mr. Lawson, go into that and then give Mr. Mindel opportunity to cross-examine so that we can determine it now as a preliminary matter if you have anything else to offer.

Mr. Lawson: As to foundation and qualification?

Assistant Solicitor: That is right.

Mr. Lawson: I have none.

Assistant Solicitor: Anything further than you have already offered.

Mr. Mindel: Well, frankly I don't see the need for cross-examination on his alleged qualifications, Mr. Solicitor, because I think they are quite patently insufficient to qualify him as an expert.

Assistant Solicitor: Well, I am going to overrule your [174] objection as to that one question if he found some value in the tablets. He hasn't stated what that value was. He merely stated he found some value and

put them on the market. Now, from there you may go on.

Mr. Mindel: Well, certainly it is a reasonable conclusion that he found some value in their use with those people in the same manner as he sells them to the public.

Assistant Solicitor: He didn't say so, Mr. Mindel. He said he found some value to them and put them on the market. That's my recollection of what he said.

By Mr. Lawson:

Q. What particular value did you find in the use of the tablets, Mr. Williams, by—

A. (Interposing): My personal value?

Q. No, by those who patronized your establishments.

A. Well, that would be to read the letters the people wrote me.

Q. That isn't what I asked you. We will come to that. What value did you find in the experiments that you conducted with those who patronized your establishments?

A. Well, it was easier for them to follow the diminishing plan of eating. They had more energy.

Mr. Mindel: Objection. Same objection.

Assistant Solicitor: Well, now, the fact that you found that, I admitted, but to say what that value is I can't admit and [175] I sustain the objection because he isn't qualified from a scientific standpoint. He has offered no qualifications to give expert testimony on the value of foods. I don't believe even an expert dietitian could come in and testify on the question of obesity and the proper treatment. He could testify on proper foods. Nurses can't give medical testimony and an expert dieti-

tian couldn't give expert medical testimony on the treatment of obesity. So I sustain the objection.

By Mr. Lawson:

Q. When did you first place the tablets here in question on the market?

A. Oh, about 1938 or '39. Until about two years of the depression, you see, that was in Los Angeles then. In a very small way, I think it was about 1938 or '39.

Q. And you have adopted that particular branch of your business since that time? A. Yes.

Assistant Solicitor: Was that question in connection with the mail-order business?

Mr. Lawson: Yes.

By Mr. Lawson:

Q. In the conduct of that business—and by that business I mean the mail-order business—did you receive testimonials from customers or users of the preparation and the plan? A. Yes, hundreds of them. [176]

Q. Could you estimate approximately how many you have received?

A. I have right there probably a couple of thousand. I couldn't tell you the exact number.

Q. What would be your best—

Mr. Mindel (interposing): I think the question is immaterial and I object to it. Since one wouldn't be admitted in evidence a multitude of them wouldn't make them any more worthy of consideration. I object to it on that ground, Mr. Solicitor.

Assistant Solicitor: If one isn't admissible how would it be competent to state into the record how many you have?

Mr. Lawson: I haven't made an offer yet, of course. This is purely a preliminary question.

Mr. Mindel: But you are asking for a statement as to how many he has received and of course you ask that for that purpose.

Mr. Lawson: Yes.

Mr. Mindel: And I object to it.

Assistant Solicitor: And you are in that manner getting into the record or would get into the record the fact that some thousand people who aren't here for cross-examination put their stamp of approval on his product. I think the objection is well made and I will have to sustain it.

Mr. Lawson: In connection with that matter I have selected from random one testimonial from a nurse. I haven't counted the number of them but I am told there is probably in the neighborhood of two thousand letters of the same general character as the [177] one that I am now specifically offering, and for the purposes of the record I should like to offer—

Assistant Solicitor: May I interrupt you, Mr. Lawson?

Mr. Lawson: Yes.

Assistant Solicitor: If you are offering that to just get your record in shape we have a procedure here whereby you may offer it for identification and leave it a part of the record for identification if you wish, or at least a copy of it.

Mr. Lawson: Well, I will offer this for the purposes of identification. Of course I assume by that—I don't know what your procedure is here but usually we offer

the document and if it is rejected by the trial court then we offer it for identification. I will make the offer and if it is requested that it be marked only for the purposes of identification, why, that is perfectly agreeable to me but I want it understood that I offer it for the purposes of the record. It is a letter dated May 1, 1945, signed by Ruth Botsford, R. N. (Registered Nurse), and that is to Al Williams and dated April 30, 1945, 216 W. Pueblo St., Santa Barbara, California.

Mr. Mindel: I object to the admission of this letter into the record, Mr. Solicitor, upon the same basis as my previous objections that it would be accepting as expert testimony the statements of persons who are not qualified to give such testimony. For one thing it is hearsay and for another thing the person is not here for cross-examination even if he were an expert. And this particular letter [178] doesn't even specifically identify the plan that we have under consideration here.

Mr. Lawson: Now, I want to get the full scope of those objections. As I understand it, part of those objections are addressed to the lack of foundation. Is that correct?

Assistant Solicitor: Lack of qualification as a medical expert, you mean?

Mr. Lawson: No; foundation for the introduction of the document itself, as to whether or not it was received by Mr. Williams.

Mr. Mindel: That's a secondary objection.

Mr. Lawson: You have no objection on that ground?

Mr. Mindel: I don't question that, that it was received by him.

Mr. Lawson: The fact was that it was mailed by the person whose name appears on the—

Assistant Solicitor: Well, we will assume that it was received by Mr. Williams.

Mr. Lawson: Now, on the other ground that the person who signed this letter is not personally present, if you require that proof, which probably you would or probably not—I wouldn't pass on that offhand—I certainly would like to have some time within which to establish it.

Mr. Mindel: I said even if this person were present and assuming but not admitting that she were qualified, that is, it [179] would be necessary that she be present if she were qualified but we don't say that she is qualified to testify and certainly the letter cannot be accepted in lieu of expert testimony.

Mr. Lawson: Well, your basis of objection is not that it is hearsay.

Mr. Mindel: Well, it is hearsay, yes. That is one of the objections.

Assistant Solicitor: Well, my ruling is that if the party were here in person that her testimony would not be admissible because she isn't qualified and if she were qualified we have the further objection to it that she isn't here and you can't have the affidavit of a doctor even because he isn't here to be cross-examined. But the first ground upon which I sustain the Government's objection is that there is no showing that she is qualified—it's a layman's letter—and also upon the ground that she is not here for cross-examination. So I sustain the Government's objection. The introduction may be made, as you suggested, for identification.

Mr. Lawson: For the purposes of the record I believe that if the objection that the writer of this letter is not personally present is to be held to by the Government that we should be permitted to ample opportunity to produce her either by deposition or by any other means upon which we might agree.

Assistant Solicitor: Let me make myself clear, Mr. Lawson. I said that there is no showing that she is qualified but even if she were qualified she would have to be present. As I have stated [180] before, you have full opportunity to introduce medical proof here just the same as the Government has.

Mr. Lawson: Yes, I understand that position all right that we are being restricted to medical testimony, but from the state of the record here I think it is admissible, but that's a difference of opinion. Maybe I don't make myself clear but I'll make this statement: that this person would be a layman within the meaning that has been attached to them here, and your ruling would be that if she were present she would not be permitted to testify as to the—

Assistant Solicitor (interposing): Unless it developed that she has the qualifications.

Mr. Lawson: Well, I mean assuming that she didn't have the medical qualifications. Is that correct?

Assistant Solicitor: That's right.

Mr. Lawson: Well, assuming that she doesn't have medical qualifications, then she wouldn't be permitted to testify.

Assistant Solicitor: If she were here.

Mr. Lawson: If she were here. Well, it logically follows then that the other objection probably would be immaterial.

Assistant Solicitor: I just answered it because Government counsel raised it.

Mr. Lawson: Well, then, I think we understand one another on that. Well, I will leave this with the reporter.

Assistant Solicitor: She will mark it Respondent's Exhibit No. 1 for identification. [181]

(Respondent's Exhibit No. 1 was received and marked for identification.)

Mr. Lawson: Now, it isn't necessary to repeat this performance for each letter that we have and may it be understood that this offer and the ruling will be extended to and applicable to whatever other letters may be tendered here?

Assistant Solicitor: Yes. Similar to the one just offered for identification.

Mr. Lawson: That's right, which would be Respondent's Exhibit No. 1.

Assistant Solicitor: Which are testimonial letters.

Mr. Lawson: That's right.

Assistant Solicitor: I think the record can show that that offer was made as to whatever others you may have with you.

Mr. Lawson: And I have, as I said before, quite a number—

Assistant Solicitor (interposing): And the same ruling made.

Mr. Lawson: That's right. As I said before, there are quite a number of them here. I have been told, but I don't know, I didn't count them, there are approxi-

mately two thousand letters which are in the nature of testimonial letters. Now, for the purposes of parity, there has been much testimony introduced by the Government touching the various phases of this plan and the preparation, one, that it is a food that takes hunger away and so on. Now, this particular letter only touches probably [182] one phase but the other letters which I would offer in evidence would be letters in testimony of the results obtained with reference to the particular complaints, that is, every complaint that has been made here. Do I make myself clear?

Mr. Mindel: When you speak of complaint do you mean charged here?

Assistant Solicitor: The memorandum of charges, he means.

Mr. Lawson: The charges, yes. One here I find in a letter dated March 1st—This is not, as I understand, subject to the same ruling that has been made here—It is dated March 1, 1945, from one who used the tablets, Mrs. Lovel Brown (reading):

> "I find it so easy as I never got hungry taking your treatment. Please send at once."

Now, that may not be covered in that letter. The letters that I have here will cover every charge which we contend in the opinion of those who have used it is evidence contrary to the contentions of the Government.

Mr. Mindel: Well, since the one letter is objectionable, certainly all of them would fall into the same category; the same objection would be made to them.

Assistant Solicitor: Well, Mr. Lawson concedes that if one is inadmissible they all would be, but what he means is that he wants the record to show—

Mr. Mindel (interposing): Of course there would be nothing to stop him from introducing as for identification samples of each of the categories he has in mind. I don't see [183] any objection to his doing that.

Assistant Solicitor: Can you do that, Mr. Lawson?

Mr. Lawson: I can do that, yes.

Mr. Mindel: I assume that is what you had in mind.

Assistant Solicitor: That is what he had in mind. Well, suppose you take the time to do it because I don't want you to be put to any disadvantage as far as the record is concerned. If you think you want them in the record for identification you have that right to put them in, but Government counsel raises the question that you should put one of each type of letter in that you wish for identification.

Mr. Lawson: Well, I can do that. Do you want to give us a little time or—

Assistant Solicitor: Whichever you prefer, sir. You can do it afterwards or do it now.

Mr. Lawson: Well, I will select them and then offer them subject to the same ruling that has been made here at the conclusion of the case.

By Mr. Lawson:

Q. I hand you, Mr. Williams, a statement in the form of a letter from S. O. Barnes & Son dated June 5, 1945, addressed to the Dietary Research Laboratories, 3025 South Grand Avenue, Los Angeles, California, under the caption "Subject: Formula #4." To what does that Formula #4 refer?

A. It refers to the formula of those tablets right there.

Q. And when you say those tablets you mean the tablets in [184] question in this case? A. Yes.

Mr. Mindel: Are you making an offer?

Mr. Lawson: Yes, I will make an offer.

Mr. Mindel: No objection.

Assistant Solicitor: Let this be marked Respondent's Exhibit No. 2, and the Government has no objection to it.

(Letter dated June 5, 1945, addressed to Dietary Research Laboratories, Los Angeles, California, by S. O. Barnes & Son, Gardena, California, concerning Formula #4, marked Respondent's Exhibit No. 2, was offered and received in evidence.)

Assistant Solicitor: Any further examination concerning that right now, Mr. Lawson?

Mr. Lawson: No, that is all. I might say I think the witness has already testified that that is the formula for the tablets here in question.

Assistant Solicitor: He has so testified.

By Mr. Lawson:

Q. Referring to the cream in question, which is presumably that in Government's Exhibit No. 4, will you please state, Mr. Williams, what that cream is used for in your experience as a—

A. (Interposing): We use the cream for massage on the external part of the skin and for persons who are heavy in order to bring about an astringent to the external layers of the skin.

Mr. Mindel: I object. This again takes the form of expert [185] testimony as to astringent effects of a certain product and for which testimony I do not believe Mr. Williams is qualified.

Assistant Solicitor: What was your own medical testimony concerning it as an astringent; was there any?

Mr. Mindel: Not in that particular way. The testimony was that it did not have the effect claimed for it.

Assistant Solicitor: Is the astringency of a product necessarily a medical question?

Mr. Mindel: In my lay opinion it is, yes. You have to testify as to the effects upon the skin, within the skin, created by the application of this cream.

Assistant Solicitor: There is no charge in the record, though, that it isn't an astringent. I am going to overrule your objection.

By Mr. Lawson:

Q. How long have you used that cream for the purposes indicated by you?

A. Seven or eight years. I use it in my establishment all the time.

Q. Extensively?

A. No, in special cases where they have a lot of flabby tissue—not on everybody—we have different preparations. But this here where fat, flabby tissue, you know, because it—allow to create no friction you see in the manipulation by the masseur or by a person who might manipulate themselves, you see. You can demonstrate it very simple. [186]

Q. And what has been the effect of the use of the cream in the manner indicated?

A. Well, I think it wonderful.

Mr. Mindel: I can't hear you, Mr. Williams.

The Witness: For the person who uses it properly and applies it it is amazing what it does. I can demonstrate here and show you the effects of it.

Mr. Mindel: Well, I object to testimony of that nature. It certainly goes back to whether he is qualified to give medical testimony as to the effects. What does he mean by amazing and wonderful?

The Witness: Well—

Assistant Solicitor: Now wait just a minute, Mr. Williams, there is an objection. We received medical testimony upon the subject of what was the effect and held that this witness isn't competent to give medical testimony. Particularly in connection with the charge here that this cream will eliminate flabby flesh I think it is a medical question. Also the question of beautifying the contour of the throat and other parts of the body.

Mr. Lawson: The same ruling on that if offered?

Assistant Solicitor: That's right. It is a medical question.

Mr. Lawson: Well, we will make the offer then with the same ruling.

Assistant Solicitor: Yes, I sustain the Government's objection. [187]

Mr. Mindel: In view of your sustaining my objection I move to strike the answer of the respondent.

Assistant Solicitor: I sustain the motion.

Mr. Lawson: I guess that would be about all.

Assistant Solicitor: Government counsel may cross-examine, Mr. Lawson?

Mr. Lawson: Yes.

Assistant Solicitor: Proceed with the cross-examination, Mr. Mindel.

Cross-Examination

By Mr. Mindel:

Q. Mr. Williams, you have given us a little biographical sketch of yourself, your activities, and in 1906 you say you were engaged in boxing and wrestling?

A. That's right.

Q. Where was that?

A. Oh, in Illinois, Ohio, Nevada. I went all over the country—different places.

Q. How old were you then? A. About 18.

Q. You mean you originated in Ohio; is that what you meant to say?

A. It was in Wheeling, West Virginia, the first time when I began wrestling. Well, I started in from a youngster because [188] when I was about eleven I wasn't very strong and I took up athletics to build myself up and I started to wrestle when I was about sixteen or seventeen.

Q. In discussing the titles which appear in the caption of our charges you mentioned that the health conditioner title is used by you in connection with your general health conditioning program. Do you mean by that statement to deny that it was used in connection with the sale of the plan we have under charges here?

A. No, it was used—You see that was my original plan. The Al Williams Health System, Al Williams, Health Conditioner, that was long before I used any food by mail—for years.

Q. You don't deny that you use it in connection with the plan under charges here? A. Oh, no.

Q. You stated that fifty thousand persons have attained better health under your supervision. Is that correct? A. Yes, probably more.

Q. Do you mean to say that you personally brought them through the course which they took; that you personally supervised the activities that they went through in your course?

A. Not all personally but I managed the entire organization. I hired the people, trained the people, I trained the masseurs, trained the instructors, and carried through the idea the psychology of improvement to be imparted to those people through myself, yes.

Q. But you yourself actually only saw a small percentage [189] of those people?

A. Oh, no, many of them. From 1920 to 1927, a period of seven years, I must have seen myself twenty or twenty-five thousand people.

Q. You personally?

A. Yes, that is, I don't mean the actual operation.

Q. Well, that's what I mean.

A. Oh, no, not that. I mean I otherwise met people, made a physical checkup and pass on the instructions to the instructor to carry on. You see I haven't done any of my own personal manipulation, except occasionally, since 1925.

Q. Twenty year ago.

A. That's right. You see, my organization began to grow. Q. Since that time only a very small percentage of people, if any, were actually treated by you if we use the word "treat".

A. I don't know what you mean by treating. You see—

Q. Attended by you, shall I say, while they took your course?

A. I merely see everybody in different branches naturally but not actual contact. I haven't had any since 1925.

Q. That is done by your subordinates?

A. Yes, that's right.

Q. Well, what does the figure seventy-two thousand cases that you use in your literature mean—seventy thousand?

A. Well, that there's including the mail-order plan. We probably have handled more than that. We just merely have a figure—we have handled so many people over a period of twenty-five years [190] that we haven't got the actual count.

Q. You mean you guessed at the figure, is that correct?

A. It isn't a guess. It is probably more than that even.

Q. Well, how is it that in another place you use the figure 32,000 as the number of people you have treated?

A. 32,000?

Q. Yes.

A. Well, it might have been some of the literature that was made a long time ago.

Q. Well, this is literature that has been received within the last few months.

Mr. Lawson: I believe the witness is entitled to see the specific statement in the particular literature.

Mr. Mindel: Well, does the witness deny that appeared in his literature?

Assistant Solicitor: If it is in evidence, Mr. Mindel, I would call his attention to it.

Mr. Lawson: That may be at an early date for all I know.

Mr. Mindel: On the back of the "Magic Seven Exercises" chart there is this statement (Government Exhibit 5-C-5):

> "Al Williams, the nationally known authority, has devoted his entire life to the single purpose of BODY CONDITIONING. During the past 20 years more than 32,000 persons have sought his services in this field."

The Witness: That chart is twelve years old.

Mr. Mindel: This circular is twelve years old? [191]

The Witness: Yes. Let me take that back. That is about ten years old because there was another chart before that.

Mr. Mindel: And the picture on there was taken of you at that time?

The Witness: Yes.

Mr. Mindel: What about the picture on 2-C-1?

The Witness: Oh, that there's about seven years old. No, let's see, that picture there was—that photo was made about three, no, two years ago.

Mr. Mindel: Two years ago?

The Witness: Yes.

By Mr. Mindel:

Q. Well, you said, I believe, that you started selling these tablets about 1938. A. Yes, 1937 or '38.

Q. Prior to that time you did reduce many people in your clubs, did you not? A. Yes.

Q. But they didn't use pills, did they, tablets?

A. Not at that time, no.

Q. You didn't find it necessary to give them tablets in connection with any plan they followed?

A. At that time we didn't use any nutrition except the changes in food programs. That's the time I became very much interested to find a substitute to relieve that hunger feeling, because there is a problem with reducing programs that people [192] won't follow through the plan. Reducing is very easy when you can follow the plan. And this concentrated nutrition gave me the opportunity to experiment with it and it works. It worked with me and it worked with other people.

Q. You say it worked with you, Mr. Williams. Do you consider your physique the average physique of a person such as those to whom you sell this plan?

A. Oh, some of them are better than mine.

Q. How tall are you? A. I am six feet one.

Q. And how heavy are you? What is your weight?

A. My weight runs between 220 and 340.

Q. Do you consider that a normal weight for a man your size and your height?

A. For my type of business, yes.

Q. For your type of business?

A. Yes, the type of work I do, that I've been brought up to.

Q. You don't consider that as being overweight?

A. No. For an athlete, no. For a wrestler or boxer or a man that's as active as I am, no.

Q. You don't have any fat on your body?

A. Oh, a little now, yes. About ten pounds more than I should have.

Q. But you haven't made an effort to reduce that by your own plan?[193]

A. Oh, I have in the last ten days, thirteen pounds, yes.

Q. You make the statement that in the last ten days you have taken off thirteen pounds?

A. Sure. That's right.

Q. And you still are ten pounds overweight, is that correct?

A. Oh, it's about ten pounds. I should weigh about 220 or 225 to feel good; that is to be like I like to be. But I have plenty of health, though. I have a lot of energy.

Q. But you also have a lot of weight.

A. No, I don't think I have—about ten pounds right now.

Q. Would it surprise you to know that the average weight for a man of your size is supposed to be 184 pounds?

A. Well, that's—you can't—as far as I am concerned the average doesn't count.

Q. You mean you are above the average?

A. I would be sick at that weight. In fact when I was nineteen I weighed 220 pounds.

Q. Why would you be sick at that weight?

A. Because of my physical make-up, the bone structure, the muscles developed from exercise, and the general setup. I wouldn't be able to walk at that weight, impossible.

Q. Do you know anything about the bone structure of the people to whom you sell your plan?

A. Do I know about it? They're human beings.

Q. I say, do you know anything specific about the bone struc- [194] ture of the particular people to whom you sell your plan?

A. Only except the ones who come into my office.

Q. I am talking about through the mails now, Mr. Williams.

A. No. Except from their heights, you know, from the—

Q. (Interposing): Why should you think that if you would be made sick by such a reduction program that these people to whom you sell the plan wouldn't be made sick?

A. Well, I wouldn't follow through the plan right there.

Q. I beg your pardon.

A. I wouldn't follow through the plan.

Q. You wouldn't? A. No.

Q. I am talking about the people you sell it to.

A. Well, they wouldn't go beyond—because this program right here they can't go beyond their own limitations.

Q. They can't go beyond their own limitations?

A. No, sir.

Q. What is a person's limitation?

A. His own requirements.

Q. What do you mean by requirements?

A. I mean by his natural law.

Q. I don't understand that.

A. His own natural law.

Q. His natural what? A. Natural law. [195]

Q. L-A-W?

A. Yes, L-A-W. The requirements of natural law. Each person has his own requirements of his own natural law.

Q. But you sell your same plan to every person regardless of what his so-called natural law, what that is, may be. A. It's a basic plan.

Q. And you mean that the person himself can determine whether or not this plan would be safe or not in his own particular use?

A. Not determine. It doesn't do him any harm. There isn't any harm.

Q. Well, how do you know if it doesn't do any harm if it would do you harm? You are stronger than the other person.

A. Pardon me, you ask me a question if I would go down to that weight and I said that wouldn't be my normal weight. You are quoting from figures there.

Q. You said it would make you sick, Mr. Williams. Why wouldn't it make an average person sick?

A. No, because they can't go down there.

Q. They can't go down? A. No.

Q. What is going to stop them?

A. A person of my size cannot go down to 185 pounds.

Q. Why can't you? If you stop eating or if you eat a reduced diet why can't you?

A. You can't do it unless in a concentration camp. [196]

Q. Well, then you would be eating a reduced diet, wouldn't you?

A. It can't be done; nature won't allow it.

Q. What will happen to you? A. They eat.

Q. You could eat? A. They eat, yes.

Q. That is you would be so hungry you wouldn't go down that far, would you? A. That's right.

Q. That's right, isn't it?

A. Well, naturally—that isn't my weight. That's a general weight.

Q. Who determines what his weight is?

A. What's that?

Q. How does the person determine what his weight is?

A. Well, I imagine the average American person has some knowledge about his own requirements and when he goes on the scales he can determine whether he is losing or not.

Q. That's right, he can tell whether he is losing.

A. That's right.

Q. The figure that I quoted to you is taken from a chart that is used by doctors as to average weight. Where else would a person learn what his average normal weight is supposed to be?

A. Oh, I think judgment has a certain amount of reason, [197] observation, common sense, logical conclusion and of so feeling.

Q. Feeling of hunger, you mean?

A. Feeling of his own self. Otherwise I think an average person has a lot of intelligence in this great country of ours.

Q. You think so? A. I think so, yes.

Q. All the people who buy from you have a great deal of intelligence?

A. I think they must have intelligence because otherwise they wouldn't buy.

Q. That's a great, self-satisfying testimonial.

A. Thirty per cent of my business is repeat business.

Q. What do you mean by repeat business, Mr. Williams?

A. They buy over again the second time, the third time, or the fourth time.

Q. Well, don't you claim in your advertising that the effects of this program are lasting?

A. That's right.

Q. Then why should they have to buy again?

A. Because you have got to eat.

Q. I beg your pardon?

A. You have got to eat.

Q. I didn't understand you.

A. Because you have got to eat. You have to eat. [198]

Q. The person who bought your tablets has to eat, naturally, but how does that answer my question?

A. Well, you see they learn a new plan of eating, they learn a new plan of care of the body, they learn coordination of the organic system, nervous system, muscular system, under their own control or intelligence.

Q. They learn all that from taking your diet book?

A. No, no, by following my plan.

Q. I know, but these people are buying your diet, Mr. Williams. A. What's that?

Q. These people are buying only your diet.

A. No, they buy the complete plan. They buy the instructions and also the tablets, both.

Q. Yes, which consist primarily of the diet.

A. Well, it's a living plan. It's a change. They are buying a change—a complete change.

Q. And you tell them that the effects of the diet will be lasting, isn't that right?

A. Well, if they follow the plan through it is lasting. It is marvelous.

Q. But then you find that thirty per cent have to reorder. What is the purpose—

A. (Interposing): Because in two months time you can't change the human being completely over. The human system is going through a continuous change all the time. We have people who buy [199] and then they go off of the plan for two or three months and come back and buy again.

Q. Why do they go off the plan?

A. Well, that's a question I can't answer.

Q. Well, you made the statement. Why do they go off then?

A. Well, they bought evidently because they enjoyed the first plan.

Q. Why did they go off the plan?

A. Well, I don't know that. I know why I go off the plan sometimes.

Q. How do you know they go off the plan?

A. Well, because sometimes they make statements to that effect in their letters.

Q. And they don't tell you why they go off the plan?

A. They make many statements as to reasons why. They got hungry again. That's one of the statements they make. They got hungry again so I am going to order some more.

Q. They got hungry again after they gave up your diet? A. That's right.

Q. In other words, they weren't hungry while they were following your diet but when they went back to

their normal diet which made them obese they became hungry. Is that what you said?

A. That's what I said, yes.

Q. You mean to say that these people who eat whatever they [200] want to are going to be hungry and they won't find sustenance from regular food so they will make resort to your tablets?

A. Many, many, yes. They eat a plenty all day and are still hungry.

Q. But when they eat your tablets these same people aren't hungry? Is that correct?

A. A change takes place, yes.

Q. I beg your pardon?

A. A change takes place in the gastric and a chemical change takes place in the stomach.

Q. Do you know what changes take place there?

A. The changes, from my observation, my own feeling, I can give you that expression, but I have never had a test—

Q. What do you mean—excuse me for interrupting; go ahead, finish your answer.

A. I only can give you my own reactions that I have when I follow this plan.

Q. But you don't know what is going on inside of you, do you, except by sensations which you experience?

A. Well, I have an idea what takes place.

Q. Have you ever studied medicine? A. No.

Q. Have you ever studied internal medicine?

A. No.

Q. Or anatomy, internal anatomy?

A. Yes, I have studied anatomy—functional. [201]

Q. And the functions of the various—

A. (Interposing): Functional anatomy, yes.

Q. Mr. Williams, why do you instruct the purchasers of your plan to take the tablets with fruit juice or vegetable juice or one of the other fluids that you mention?

A. Well, because there are seventeen different vegetables and herbs in the tablets and when they are combined with fruit juice the fruit juice has a much more tendency to bring up the chemical reaction to lose the craving for additional food. You see the fruit juice has an element that comes from trees, from the air and the sun. They have a different potency than the food that comes from the ground and when you combine the two you have a reaction there entirely different to satisfy certain hungry craving.

Q. You mean the vegetables don't require sunlight and air and water?

A. No, they do require that but the fruit has a sort of—also they are very appetizing to the taste.

Q. It has an appetizing—

A. (Interposing): Water has the same effect.

Q. I beg your pardon.

A. The water has the same effect only people like fruit juices better. Also variation makes it—you know, to change is always better because life is a continuous change you know. If you make a person drink water all the time or drink fruit [202] juice—I mean grapefruit all the time or orange juice all the time they get tired so a variation of change is better.

Q. You say the fruit juice is necessary because of certain changes which it brings about in the tablet, Is that right? Is that what you meant to say?

A. Not in the tablet but in the stomach in there you see, otherwise the fruit and the tablet, the combination of the two, give a marked improvement. The energy that you have from it makes you—well, I am speaking for my ownself now, from my own feeling, otherwise I can go off of the tablets for a week's time and I find myself eating steaks, potatoes and everything and I won't have any energy. I eat the tablets, and cut down on the starchy food and I have a lot more energy, so there you are. What are the changes? It is just simply some chemical reaction in there because the tablet itself—the tablet there is itself—it is registered with the Food and Drug Administration—is a tablet that has a tonic effect. I mean there is, you know, according to Mr. Barnes there.

Q. What is a tonic?

A. Oh, I imagine anything that give you stimulation, give you happiness.

Q. Stimulate your appetite?

A. Oh, it depends entirely upon what the person desires. You know, sometimes—

Q. Well, appetite is a person's desire.

A. That's right. [203]

Q. Well, do you say that this is a tonic which stimulates a person's appetite?

A. Stimulate the energy, I said.

Q. You said it is a tonic.

A. There is—otherwise the thing is this that the tablet acts upon the energy giving element without using a good deal of bulk.

Q. Well, we are getting away now from why you tell them to take this with fruit juice.

A. Well, so they won't eat too much.

Q. So they won't eat too much?

A. That's right. It is logical that if you want to reduce you have got to go on a diminishing plan of eating.

Q. You mean to say that the tablets themselves wouldn't keep them from becoming hungry?

A. What is that again?

Q. If they took the tablets without the fruit juice that would not prevent them from being hungry?

A. Oh, they do, yes. They are very efficient. Myself personally I swallow them right down but other people can't do that, everybody can't do that, so we had to work out a plan to fit in with the individual desires and needs. Persons you know have intelligence.

Q. You say the tablets then would in themselves kill any hunger? [204]

A. Yes. I went thirteen days without eating at all except water and tablets and I played two games of handball *and* twelfth day.

Q. So it wouldn't make any difference really whether they took fruit juice or whether they took water or whether they took nothing. Is that your testimony?

A. Well, the only difference it would make is this that the person would be on a more strict regimen and people don't like anything strict.

Q. And your diet is not strict?

A. No, it is very liberal because it is left to the individual.

Q. You heard the doctor testify how many calories your diet provides, didn't you?

A. Well, that there—

Q. Six hundred to eight hundred calories a day.

A. Well, that diet there can be built up. That plan right there can be built up to 4,000 a day.

Q. How can it be built up?

A. Very simple, by choice.

Q. Well, if it is built up to 4,000 a day how is a man going to reduce his weight? A. They do.

Q. On 4,000 calories a day?

A. Yes, that's right.

Q. Did you know that the American soldiers only get 3,600 [205] calories? A. I know that.

Q. And he is going to reduce on 4,000?

A. That's right. We have testimonials to that effect right there that soldiers reduce on that plan. You see it isn't always the quantity of food that causes the weight. It is the quality of food and the combinations of food. It isn't only the quantity.

Q. Do you know what a calorie is, Mr. Williams?

A. Oh, yes.

Q. What is it? A. Calorie unit of energy.

Q. A unit of energy. Well can you give it any closer definition than that?

A. Well, a calorie is a heat unit that goes through a combustion in the system similar to the blood stream and goes through the process of metabolic change and serves its purpose and so forth.

Q. Do you know how much heat a calorie provides?

A. For each calorie?

Q. Yes.

A. It depends on the individual, on their activity, their age, and their mental attitude.

Q. Do you know that a calorie is a measurement which has nothing to do with the individual or the situation at all. It is just like one gallon of water, or one pint

of water. It is a pint of water whether you drink it or I drink it. [206]

A. Well, of course, for somebody a pint of water they would drown in it. In other words, they can take a gallon. It depends on how you use it.

Q. What makes a person fat, do you know?

A. Well, the way I think from my observation of many years, it means the individual, that particular individual, hasn't solved his own physical management.

Q. Now, what does that mean, Mr. Williams?

A. It means that his intake in greater than his outlet.

Q. His intake is greater than his outlet?

A. That's right. He is overbalanced.

Q. And if a person intook 4,000 calories you don't think that would make him fat?

A. Not of the calories or the type of food that will increase fat.

Q. Well, what gives a food the quality of creating fat?

A. Oh, the artificial foods, the manufactured foods, excessive bread, excessive butter, excessive fat things, you know, like macaroni, spaghetti, cereals and things of that type.

Q. What is it in those foods that create fat?

A. I beg your pardon.

Q. What is it in those foods that make them create fat?

A. Well, of course there are different minerals.

Q. Minerals make a person fat, is that what you mean to say? [207]

A. No, I didn't say that. I said there are minerals and there are different substances in there beyond the present stage of analysis or even the brain because we are progressing very slow.

Q. And you don't think calories are what create fat?

A. No.

Q. Do you think they create energy?

A. Yes.

Q. And if a person eats so much food that more energy is created than he needs for his activities what is the result— A. Not exactly, no.

Q. Well, that is the situation, the question which I am asking you, what happens next.

A. Well, you asked me two or three questions at one time.

Q. No, I asked you—just a minute now. I asked you what happens when a person eats a quantity of food that gives him more energy than his body needs.

A. Well, food doesn't always give you energy. It kills you sometimes.

Q. Well, I have asked the question. Can you answer it?

A. Well, you said food energy but I don't agree with you because food doesn't always give you energy.

Q. Food doesn't give energy?

A. No, not always.

Q. Do you say that your tablets are food? [208]

A. Yes.

Q. And that's the kind that gives energy?

A. Well, they are a vegetable compound you know. It is compressed you know. You see there are beets and carrots and so forth all put together in a compressed form, and the water is taken out of it.

Q. How do you determine how much energy is derived from any particular food?

A. Well, you determine by the feeling of the individual.

Q. Well, how do you determine it before you sell it?

A. If you feel energetic and you feel fine, feel like you are happy that you are alive, then you are on a good plan.

Q. How did you determine that these tablets would give everybody energy?

A. Well, the very evidence of fact is of the thousands—

Q. I said, how did you determine before you sold it?

A. I told you that. I went through myself experimenting myself with my own particular self. I went through diets and fasts, you see, and even now from time to time experiment because I am always watching that the best of products are in there.

Q. You are an athlete, are you not?

A. Yes. Well, not so much now. I have been a good athlete. Quite active, yes, I am quite active yet.

Q. And it never occurred to you, did it, that perhaps the effects of certain products upon certain people would be different [209] if their manner of living was different? If you sold this to a housewife don't you think that her life is much different than that of a professional athlete?

A. There is a difference, yes. But you see the plan here, the entire plan, is based upon a general plan. There is nothing drastic because the elasticity of the plan depends entirely on the judgment of the individual. You see the individual cannot go beyond his limitation of judgment and craving. He can't do that. There is a

safety valve in the human system. All this is by compulsion. You always go back to natural law.

Q. Before we go further will you explain very clearly what you mean by natural law?

A. Well, natural law is the thing that pushes the grass roots between the cracks of the sidewalk in there. Natural law is what makes the trees green out there. Natural law is the air that you breathe. Natural law is made by the water you drink. Natural law is the inner sense of emotions of the human being, to be a natural human being. That's what controls that, a law—a natural law. Human beings don't just live by living. They live because there is a law that controls them.

Q. In other words, natural law would be what we usually call nature and its manifestations?

A. That's right. But some people don't understand nature. They have got to be educated. They have got to learn the forces of nature and the beneficial results of nature. [210]

Q. Do you teach that to all the people who buy your products?

A. In my program there is a general outline of change, yes.

Q. You teach them all about nature—

A. (Interposing): Well, not all. I do the best that one can do in this particular endeavor.

Q. But they don't have, do they, the same knowledge which you claim you have about the workings of nature?

A. Well, it is there. If they don't know of course I can't control that.

Q. But you want them to use your system of reducing, don't you?

A. Well, yes, because it helps people.

Q. And you sell it to them even though you know they won't have the same knowledge that you have?

A. Well, anything like this you must give them knowledge with the instructions.

Q. I beg your pardon?

A. We give them knowledge with the instructions.

Q. You explain the workings of nature to them?

A. Well, it is a plan—a diminishing plan—because of people who are heavy. They eat more than they can burn up and there is a diminishing plan.

Q. They take more than they can burn up?

A. That is right.

Q. And a man who takes 4,000 calories even though he doesn't expend that 4,000 calories a day will not become fat? [211]

A. If he eats the kind of foods that don't create fat, yes.

Q. Well, all foods you know create fat.

A. I beg your pardon, I don't agree with you on that.

Q. You don't? A. No.

Mr. Lawson: Can you demonstrate that by evidence?

The Witness: Yes.

Mr. Mindel: All foods in their sum total will create fat if they produce calories. It doesn't have to be—

Mr. Lawson (interposing): That's a different—

Mr. Mindel: Of course, I am not here to testify so I won't go further on that.

Mr. Lawson: You are doing pretty well.

By Mr. Mindel:

Q. Do you know what is in your tablets, Mr. Williams?

A. Well, yes. The chemist and the men who put it up—the formula has been registered with the Food and Drug Administration, and it has been sold now for many years.

Q. Since 1938? A. Yes.

Q. And do you know the value of each of the foods that went into the making of these pills?

A. Well, I surmise the way they are checking up on them out there all the time it is very reliable, very dependable, yes.

Q. What was that answer? [212]

A. I imagine the way the supervision is out in California they must be very dependable because the Food and Drug Departments function very thorough.

Q. Well, don't the Food and Drug Departments merely see that you are—that is, they don't determine the whole plan that you are selling; they don't pass on that. You don't mean to say that, do you?

A. I mean on the tablet. You asked me about the quality of the foods that go into the tablet. The man is a reputable business man. Mr. Barnes over there is a man of integrity, being one of the pioneers in concentrated nutrition.

Q. Did you create the formula for this tablet?

A. The original formula was changed from time to time.

Q. By you?

A. No, it was changed—I worked through an agent. Mr. Summerhays, a dietary research, he's my agent who buys the food from Barnes and he was the original man who had the formula and we made some changes from time to time.

Q. What was the reason for those changes?

A. Well, I was born in Europe and there the mountaineers and sheep herders they always used a great deal of dandelion and chicory; and there's not too much food over there. So we sustain very energetic life with that and I had them put in some chicory and dandelion as the formula progressed along.

Q. You didn't originate the formula, is that what you said?

A. No. [213]

Q. Can you tell us where you got it originally?

A. The original formula was sent with Byrd up to the North Pole by, I think it was, Dr. Bonque. Mr. Summer-Hayes was one of his salesmen.

Q. Dr. Bonque; you mean he works for Barnes?

A. I don't know whether he works for—at the time I met him he was working for himself.

Q. You mean Admiral Byrd was using it for a reducing plan up at the North Pole?

A. Not a reducing plan. It was taken up there so as to prevent taking so much bulk and in order to give equal amount of energy to the—the advertising at that particular time was sponsoring that particular idea.

The advertisement, you say?

A. The advertisement at the particular time. That's why I became so interested in the formula, you see, on this concentrated nutrition.

Q. So you say actually it makes no difference if the person takes these tablets with the fruit juice or other liquid or not?

A. Well, the thing is this it makes no difference but the liquid and the tablet give you more of a volume. When you take the tablet alone by itself it is hard to

swallow. It is much easier to follows the plan. With water it would work just as well.

Q. Water would work just as well, you say?

A. Just as well, yes.

Q. And you say that if you took these tablets with the water [214] that would kill your hunger?

A. That's right, yes, and give you energy too. Keep on functioning.

Q. Since you started selling this plan that we have under consideration here you sold it to people all over the United States, did you not?

A. That's right, yes, sir.

Q. Through the mails? A. Yes.

Q. And most likely you never saw any of those people who bought it unless they happened to live in Los Angeles?

A. Well, some even came in to see me from different cities; came in and bought some more food. I had occasion to meet a half dozen or more from way out of town. In fact, one came in from Detroit to see me.

Q. But a half dozen or more is about all?

A. That is, yes, from—

Q. From those outside of your area?

A. Yes. Of course in Los Angeles there are many of them.

Q. But you sell this in every part of the country?

A. Yes, all the forty-eight states in the Union.

Q. So you have no means really of observing the behavior of these people during the time they took—

A. (Interposing): Except from the questionnaire I sent them. [215]

Q. After they had been taken for some time?

A. You see, the plan is two months and when the two months are up we suppose that they went through the plan and we send them what we call a questionnaire to find out how much results they have had and in turn they send it back to me with their impressions and their results.

Q. That is the one on which you have four questions which you ask them? A. That is right.

Q. The only information you have then concerning the manner in which the purchasers were using your plan was the answers which they gave to your letter which contains four questions and which you sent out subsequent to a sale. Is that correct?

A. Yes, sir.

Q. And those four questions are as follows:

"Did you follow the food plan?

"Did you follow the bathing plan?

"Did you take the internal bath as directed?

"Did you use the massage cream? How much weight have you lost?"

That's all the information you have?

A. That's right.

Q. Who prepares your advertising, Mr. Williams; do you do that yourself?

A. Mostly all myself, yes, except sometimes I call in an advertising man.

Q. And the responsibility for any statements or claims is yours? [216]

A. Yes, that's right.

Q. And it is your statement, it is your belief, as you state in this same letter, that after weight reduction is

brought about the concentrated foods may be taken occasionally as a general tonic to remain physically fit. That's your statement?

A. That's right, yes, sir.

Q. Have you told us what you consider tonic in these tablets? Have I asked you that question?

A. Well, I have told you that the tablets give you additional energy.

Mr. Lawson: I think that is in the record.

By Mr. Mindel:

Q. And that is what you mean by tonic?

A. Well, that's what they—it's an aid to give you more buoyancy. As I understand a tonic it is something to stimulate. Isn't it? Of course, I don't know whether that is—

Q. Well, it is your statement in advertisements.

A. Yes. A tonic, as I think it is in the Webster Dictionary, is something to stimulate and to give you additional energy.

Q. Well, there are seventeen different ingredients in there as stated before. There is some liver, some heart muscle extract, and they are just simply to me and to some of the people from their reports they are wonderful.

Q. They are wonderful you mean in stimulating a man? [217] A. That's right, yes.

Q. How does it stimulate them?

A. Well, now, reference to when I use the tablets all the time I have more energy, more grit, more strength, I have more will to do things, more ambition, I have a keener mind, I have more determination, more courage, whereas if I don't eat the tablets I have more indolent, sort of laxity, sort of a—

Q. When you have more energy you expend more energy, that is, you become more active?

A. I become more active. I do, yes, very more active. In fact many of the other people do too from their letters.

Q. Well, does that increased activity result in an increased appetite? A. No.

Q. You don't desire more food? A. No.

Q. You can be more active without wanting more food? A. That is right.

Q. And you can expend energy without requiring replacement of that energy, is that correct?

A. Yes, sir.

Q. And you say also that this so-called tonic will be efficacious in causing the person who has reduced to remain physically fit? A. That is right. [218]

Q. Of course that doesn't take into consideration the thousands of things that might occur to a person's body or system, does it, in his every day life? You mean to say that would offset any—

A. (Interposing): Oh, just in that general plan otherwise that statement there is sort of a—as long as you follow the plan and you take the tablets you will find yourself you maintain physical fitness.

Q. But you don't say that. You merely say that after you have your weight reduction, after. Therefore, you are off the plan. You take these tablets and you will remain physically fit.

A. That's right. They do give you more energy.

Q. You mean to say if I am particularly susceptible to colds, for instance, this will stop me from getting colds? A. Well, I don't know that.

Q. It wouldn't do that, would it?

A. I don't know.

Q. You don't really know the statement to be true that you have here, do you, that it will cause a person to remain physically fit?

A. Well, if a person does carry through—otherwise, if you figure that overweight is a deficiency and as long as you maintain your normal weight, generally is an efficiency, naturally by keeping that condition you are bound to be efficiently healthy.

Q. By maintaining a normal weight a person is bound to be healthy. Is that what you say? [219]

A. Yes. I am speaking of the person who is fat. I don't speak about the general public. I speak about the person who is fat.

Q. Here you are speaking, Mr. Williams, of the person who was fat but is no longer.

A. That's right. If that person there—

Q. (Interposing): This is a person of normal weight.

A. —maintains a rational, sensible way of eating and takes some of those tablets he can maintain an even keel much easier than he would otherwise.

Q. But not even you tell the man to follow your diet after he has obtained normal weight.

A. What is that?

Q. You don't tell the man to follow your diet after he is down to normal in his weight, do you?

A. Well, of course, we don't adopt all of our customers you know. We simply sell the product for two months, but I can't—you see, the plan there is a two months program. The reason we make a two month program is because we get new foods in all the time so they won't lose their vitality and energy. At the end of two months we send them the letter so naturally if a person wants to lose—take for reference, we have one

woman, that Mrs. Cooper now, she went down 157 pounds all told in a period of eighteen months. That picture was taken when she only lost 103 pounds. [220]

Q. But Mr. Williams we are speaking of people who have already gotten down to their normal weight and you tell them that after they have gotten down to their normal weight the only thing you tell them then—you don't tell them to follow any food plan—you merely tell them to take these tablets and they will remain physically fit.

A. Of course the interpretation of that meaning there it was intended for the purpose to maintain an equilibrium of intake, you se Otherwise, take the tablets because naturally as you take the tablets you don't require that additional food.

Q. I didn't catch the last statement.

A. As you take the tablets you don't require additional food because that has a tendency to give you a sort of satisfied tendency to not desire any additional food.

Q. You mean the person then will continue on the diet?

A. If he has the desire to, yes.

Q. After he gets down to his normal weight?

A. The diet? No, he can go off the diet to some certain amount.

Q. Your testimony is a little confusing to me. In one moment you say he should go off of the diet when he gets down to his normal weight and in another moment you say that he should continue it.

A. Well, it is a question of judgment of the individual there. Take my own particular case. Right now I am about [221] ten pounds overweight. If I go on a reducing plan to take off those ten pounds, then when I

reach 220 if I want to keep a normalcy of weight I have got to watch my weight closely every day and I use what I call a five-pound plan. A five-pound plan is a plain diet. You see when I go up five pounds more than I cut down again and take the tablets, otherwise I use the plan.

Q. What causes you to increase those five pounds?

A. Oh, sometimes overindulgence.

Q. Therefore you are not on any particular diet at that time?

A. No, I think it would be miserable to be on a diet all your life.

Q. Exactly, Mr. Williams. So we get down to something that I am trying to make clear and that is that the person has now reduced down to normal, he is off any kind of a diet that you are offering him, and you are telling him that on his ordinary diet, which is up to his choosing, by taking these tablets he will remain physically fit?

Mr. Lawson: I submit, Mr. Solicitor, that the question has been answered.

Mr. Mindel: In a very confusing way, I must say.

Mr. Lawson: It has been answered several times and this is merely argumentative.

Mr. Mindel: It certainly is not.

Assistant Solicitor: I think you are arguing with the [222] witness, Mr. Mindel.

Mr. Mindel: Well, frankly the answers I get aren't the clearest in the world and I am trying to clear them up for the record.

By Mr. Mindel:

Q. Can you answer the last question?

A. What is it?

Q. This person has gotten down to his normal weight by taking your diet, we shall say. There are some people like that, isn't that correct? A. Yes, that's right.

Q. And then you sell him your tablets and you tell him that "after you've gotten down to your normal weight you don't have to follow any further diet." Isn't that when you tell him, but take these tablets?

A. No. You must remember this that control of weight is beyond the food plan entirely. It is a question of knowledge, common sense and learning. A person who has learned how to take off twenty pounds he has a knowledge in his mind what to do, and naturally the reason that we send that letter for renewal purpose and to find out the results is because everybody cannot make a change in two months.

Q. You mean everyone can't reduce in two months?

A. Not in two months completely, no. Take like the Mrs. Cooper mentioned, she took off a hundred and fifty-seven pounds [223] in eighteen months.

Q. The purpose of sending this additional letter has nothing to do with your desire to sell additional tablets then?

A. Some yes. Yes, when they need it, because people forget you know. It is just a regular part of the plan. Both to find out what results were received and also to bring it to their attention.

Q. And you want to continue selling it to them even though they have reduced, isn't that true?

A. No, not exactly. It is optional.

Q. But you do want to sell it to them, don't you?

A. Well, if they want to. They are bought for some purpose. Take we have many people who buy the tablets just for their use because they like them; makes them

feel better. Many of them have testified to that effect. I eat them for that purpose myself. They make me feel good, excellent.

Q. Do you like the taste of them?

A. The taste?

Q. Yes.

A. I don't like the taste. I swallow them down so I don't taste them.

Q. That is what you are supposed to do, isn't it?

A. Yes.

Q. The person taking these wouldn't taste them, would he?

A. No, not if they are swallowed. Some people chew them, it is surprising though. [224]

Q. But you tell them not to chew them?

A. No, because it is kind of bitter you know. It is dandelion and watercress, you know, they are bitter.

Q. So contrary to a statement which I remember reading in your literature some place, it is not a pleasant tasting tablet if you chew it, is it?

A. No, it is not very pleasant tasting. It is a regular vegetable compound. Vegetable compounds are always sort of bitter. Yet people do like it some.

Q. What was your purpose in including in your formula red pepper?

A. That was in the formula when I was experimenting with it.

Q. Well, didn't you later make changes though?

A. Yes, that's right.

Q. But you didn't eliminate it?

A. No, because as I say the changes that I made were the dandelion and the watercress from the original formula.

Q. You added them? A. Added, yes.

Q. Well, wasn't your purpose to make this a food tablet? A. It is a food tablet.

Q. And chili is a food?

A. Oh, it grows from a vegetable. It belongs to the vegetable kingdom, yes. [225]

Q. It is not an irritant?

A. Well, it depends entirely on the extent that you use it.

Q. There is reference made in your advertising to something called "activators." For the sake of the record will you explain what they are?

A. It is a laxative.

Mr. Lawson: Pardon me just a moment. I object to that because it has already been stated by counsel that it isn't a part of the plan. I don't see what contribution that would make.

Mr. Mindel: Well, he has said that you should take enemas in connection with the diet and if you can't take enemas you should take his activators. That is very clearly shown in the literature.

Assistant Solicitor: Well, is it or is it not a part of the plan? Are you gentlemen in agreement on whether it is or not?

Mr. Mindel: It is a part of the plan, yes, sir.

Assistant Solicitor: Well, answer the question then Mr. Williams. I overrule your objection, Mr. Lawson.

The Witness: Will you repeat that question, please?

Mr. Mindel: What are "activators"?

The Witness: The activator is a vegetable compound formula which is supplied by the Dietary Research there

which brings about a mild sort of activation to the individual who uses it.

By Mr. Mindel:

Q. How do you take them? [226]

A. I recommend they take from one to—doesn't it say right there, one or two.

Q. Do you take them by mouth?

A. Yes, by mouth. They take three in the evening or one with each meal. Each person uses his own judgment.

Q. Would you say that is a laxative?

A. It is a mild form of laxative. It has been passed by the Food and Drug Administration in Los Angeles. It is an oldtime formula of vegetable compound.

Q. And you recommend the taking of this laxative, you say, several times a day?

A. No, just occasionally as the person you know—you see the internal bath from my experience is very valuable in the reduction of weight because in the first place it eliminates all the fecal matter and the waste material in the colon and it gives an opportunity to assimilate new feces in there; otherwise to give a chance to the shrinking processes of the colon.

Q. To shrink the colon, is that what you said?

A. Well, it does. When you take an internal bath it always does when you eliminate the waste or the bulk that is inside.

Q. Well, doesn't the forcing of the water in there expany it?

A. A small amount. The sac itself expands a little bit and then contracts very fast again. I expand from two to three inches without any deficiency of any kind.

Q. How do you determine that?

A. Well, by my belt. [227]

Q. By your belt?

A. Yes, because you see I can take an internal bath and lose two or three pounds of the heavy waste matter that's been laying there probably for a couple of weeks, three weeks, four weeks, sometimes ten years, twenty years, even, and by a complete internal bath the waistline goes right in a couple of inches, three inches.

Q. You consider yourself to be in good health?

A. If health was money John D. Rockefeller would be no comparison.

Q. And yet you say in your wonderful state of health fecal matter remains in your system for great lengths of time?

A. Well, I think if anybody has any logic in his mind, any understanding of physical management he is bound to be better for a long time.

Q. I beg your pardon.

A. If a person has some judgment and some logical sense of judgment in his mind to carry through a living plan, understanding of qualification and limitation of the individual, he is bound to feel better and live longer.

Q. That is not my question, Mr. Williams.

A. What was your question?

Q. I say in your fine state of health you say the fecal matter remains in your system for a period of weeks.

A. No, I said in some cases, in some people, yes, many years. That's why there is so much— [228]

Q. (Interposing): Years?

A. Yes, sure.

Q. How did you ever determine that?

A. Well, with internal therapy we find oftentimes pocket formation; where you give personal service. We have a personal service in our department too, you know.

Q. You have doctors working for you?

A. Oh, I have a chiropractor.

Q. A chiropractor? A. Yes.

Q. And he makes internal investigations?

A. No, no internal investigations. He gives internal therapy.

Q. Well, how does he determine the age of the fecal matter?

A. Oh, very simple. Sometimes it comes out hard like a stone.

Q. How does he determine the age of it?

A. Well, he doesn't determine the age but sometimes I have seen myself fecal matter just as hard as a rock.

Q. You have never submitted to a laboratory for examination, have you?

Mr. Lawson: It is all very interesting but I think we are straying pretty far afield.

Assistant Solicitor: Well, without acting on the motion—

Mr. Lawson: (Interposing): I make— [229]

Assistant Solicitor: I say, I concur in what you say we are going far afield.

Mr. Mindel: Well, he was testifying as to the effects or rather as to the value of the internal bath so-called in his plan. He hasn't shown, at least I don't believe he has shown, where the plan helps in the reduction of weight, and I think he attempted to do that by saying that there is residing in the colon for many months perhaps in some instances fecal matter which when eliminated by the internal bath results in a reduction of body weight.

Mr. Lawson: I don't think he stated, Mr. Mindel, as I recall, that that was the result. I think that was just an incidental reference made by the witness.

Assistant Solicitor: He testified that in his opinion the enemas were valuable for reducing.

The Witness: All fat people are congested.

Mr. Mindel: That's a conclusion of your own?

The Witness: Positively.

Mr. Mindel: That's a mere conclusion.

The Witness: Otherwise they wouldn't be fat. There's a congestion of the cell structure.

Mr. Mindel: What is the cell structure, Mr. Williams?

Assistant Solicitor: (Objection raised by the Solicitor not transcribable.)

The Witness: I mean the cell, the human cell, the smallest unit in the system. [230]

Mr. Mindel: Well, I think when he volunteers statements we should ask him to clarify them for the record to show whether he knows what he is talking about.

Assistant Solicitor: I might state this, Mr. Mindel, that he hasn't qualified as a medical expert. I excluded testimony on direct examination over your objection into which you have gone at great length on cross examination, at great length. Now this very question would have been excluded over your objection if the counsel for the respondent had gone into it. You have at great length gone into medical questions about which he admits he is not qualified. That's why I say we have no authority for arguing.

Mr. Mindel: Well, what I was trying to do, Mr. Solicitor, was to determine how he came to make the representations that he does for these various phases of his plan.

Assistant Solicitor: But he answered that question by saying that in his opinion an enema was valuable in reducing. That's his opinion.

Mr. Mindel: All right, sir. I have no further questions.

Assistant Solicitor: Anything further, Mr. Lawson?

Mr. Lawson: I have no further questions.

Assistant Solicitor: Have you any further testimony to offer?

Mr. Lawson: None. [231]

Assistant Solicitor: Then I take it the respondent rests?

Mr. Lawson: Yes.

Assistant Solicitor: Does the Government have anything in rebuttal, Mr. Mindel?

Mr. Mindel: The Government rests.

(Witness excused.)

Mr. Lawson: These are the letters that I have selected.

Assistant Solicitor: For identification?

Mr. Lawson: Just for identification.

Assistant Solicitor: Have you counted them, Mr. Lawson?

Mr. Lawson: No, I haven't.

Assistant Solicitor: Well, they will be numbered consecutively from 3—there are eighteen of them—to 20.

(File of testimonial letters, received and marked for identification, Respondent's Exhibits 3 to 20.)

Assistant Solicitor: Mr. Lawson, I want to say to you, both the Government and the Respondent have rested, if you desire to make oral argument at this time you may do so. It isn't compulsory by any means, but you will be given opportunity to brief the case, or you may do both, but whatever oral argument you desire to make you may make now into the record. However, you will be given an opportunity to have a copy of the record and then file your brief.

Mr. Lawson: I would prefer to do that because I think it saves time.

Assistant Solicitor: Well, I didn't want to cut you off [232] from oral argument.

Mr. Lawson: I understand that. I would like to brief the facts and the law.

Assistant Solicitor: You will be given opportunity to do that.

Mr. Lawson: In determining the time within which to do it I trust you will be a little bit indulgent with me because I do have a pressure of matters to take care of just like everybody else. In the meantime I might state that the article is not being sold or advertised and there could be no harm resulting to the Government.

Assistant Solicitor: I will just make this statement, Mr. Lawson, that when the parties are on the Pacific Coast a little additional time is given to transmittal of the transcript and so forth. Now, if you find when you receive the letter transmitting the transcript which tells you by what time you can send the brief in, if that isn't sufficient time make application and show cause in your letter why you want additional time and send that in right away.

If there be nothing further then let the record show that the hearing adjourned at 6:10 p. m. on June 20, 1945.

(Whereupon, the hearing adjourned at 6:10 o'clock on June 20, 1945.) [233]

["EXHIBIT B"]

POST OFFICE DEPARTMENT
Office of the Solicitor
Washington 25, D. C.
F. & L. Docket
14/381

December 6, 1945

In the Matter of Charges That
AL WILLIAMS,
AL WILLIAMS, HEALTH CONDITIONER,
AL WILLIAMS, PHYSICAL CONDITIONER,
AL WILLIAMS HEALTH SYSTEM,
THE AL WILLIAMS HEALTH SYSTEM, and
WILLIAMS HEALTH SYSTEM
at

Los Angeles, California, are engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended).

MEMORANDUM FOR THE POSTMASTER GENERAL EMBODYING A FINDING OF FACT AND RECOMMENDING THE ISSUANCE OF A FRAUD ORDER

A hearing was held before this office in the above entitled case on June 20, 1945. The transcript of the proceedings is hereby made a part hereof. Proceedings were instituted by the service on respondents of a notice to show cause why a fraud order should not be issued

against the names set forth in the caption [234] hereof, stating the time and place of hearing, together with the specification of charges which as amended reads as follows (R. 2-9):

It is charged that the above named party and concerns are engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), which said scheme is in substance and effect as follows:

Said party and concerns are obtaining and attempting to obtain various remittances of money through the mails from divers persons for tablets called "Foods That Take Hunger Away" together with "Al Williams (weight) Reducing Plan" and for a "Special Body Massage Creme" upon pretenses, representations and promises contained in advertisements and in written and printed matter sent through the mails to the effect:

That obese persons will lose weight easily and safely through use of the said plan regardless of the number of pounds they are overweight or of their age or failure to reduce by other methods;

That the said plan does not include a "strict diet";

That said tablets contain foods which eliminate hunger, and that the taking of these tablets in connection with the said plan will prevent the users from becoming hungry;

That a few days' use of the said plan and tablets will result in the user's loss of his desire to overeat

and cause him to "feel full of pep and have more energy";

That said "Special Body Massage Creme" will eliminate "flabby flesh" caused by the loss of weight; and

That the said "Creme" will "beautify the contour of [235] the throat, bust and upper arms, calves of legs and thighs";

That the said tablets act as a "general tonic" and their use will enable persons who have attained a normal body weight "to remain physically fit";

Whereas, in truth and in fact, said preparations and plan will not and cannot accomplish the results aforesaid, but all of the said pretenses, representations and promises are false and fraudulent.

The respondents were represented by counsel at the hearing and the respondent Al Williams appeared in person. A written answer was filed by the respondents, in which the aforesaid charges are denied. Subsequent to the hearing, a copy of the transcript was furnished to the respondents and a brief and supplemental brief were filed by them.

On the basis of the entire record I find the following to be the facts in this case:

All of the names listed in the caption hereof are used by the respondents in conducting their business through the mails from Los Angeles, California.

The reducing "plan" sold through the mails by the respondents is advertised in periodicals of national circulation and by written and printed matter sent through the

mails. The following are excerpts taken from the printed circulars of the respondents:

> Reducing CAN BE FUN WITH FOODS THAT TAKE HUNGER AWAY Try This New Amazing Method! It's simple—easy to follow. No "Canary diets" or strenuous exercises.
>
> (Gov. Ex. 1-A)

> MEN! WOMEN! Amazing New Way to LOSE WEIGHT [236]
>
> With Foods That Take Hunger Away! Look younger! Feel Better! If you are overweight SEND NOW for proven plan that has helped thousands from coast to coast shrink 5 to 10 inches around the waist, bust, hips! Get rid of dizziness, shortness of breath, heart palpitation, head and back pains; blood pressure and other symptoms due to excess weight. Send today for FREE information on my proven Reducing Plan with Foods That Take Hunger Away. No starvation diets. No thyroid or harmful drugs. Not sold in stores. WRITE NOW FOR FREE DATA,
>
> Al Williams Health System
>
> (Gov. Ex. 1-B)

> REDUCING CAN BE FUN WITH FOODS THAT TAKE HUNGER AWAY—NEW AMAZING METHOD! LOOK YOUNGER FEEL BETTER
>
> NO MORE "CANARY-BIRD" DIETS or BACK-BREAKING EXERCISES TO ACHIEVE YOUR DREAM OF ROMANTIC LOVELINESS!
>
> (Gov. Ex. 1-B)

REDUCING PLAN THAT TAKES HUNGER AWAY contains NO DRUGS, NO MEDICINES, NO THYROID MATERIALS—IN FACT NOTHING THAT COULD NOT BE GIVEN TO A CHILD WITH SAFETY.

(Gov. Ex. 2-C-3) [237]

REDUCING IS MADE EASY, in a SENSIBLE WAY. It is logical that if you cut down the amount of food usually taken, you are bound to reduce. But the problem arises that when you cut down on your food intake, you become hungry, have a craving for more food, and cannot diet without often injuring your health. It is impossible to go very long on a rigid diet. IT IS NOT DIFFICULT TO STAY WITH MY PLAN. It is amazing what you will be able to do when you CHANGE your blood stream with FOODS that bring you down to your normal weight. Not only will you look better, but you will FEEL BETTER, more ANIMATED and MORE VIGOROUS.

(Gov. Ex. 2-C)

It is adaptable to men and women and children of all ages. Persons as young as 12 and as old as 80 have reported excellent results from my reducing method.

(Gov. Ex. 2-C-3)

These foods, contains 17 different fruits, minerals and vegetables dehydrated into pleasant tasting tablets. I usually suggest taking of them before meals, and when ever you feel hungry during the day. You will find that after a few days you will not

crave to overeat, and you will feel full of pep and have more energy. If you diet without taking these food supplements, you become too hungry, tired and nervous to stay with a low calorie diet long enough to lose weight.

(Gov. Ex. 2-C-3)

It is possible that you have tried before to get rid of unwanted fat. Perhaps you have enthusiastically [238] embarked on some kind of "diet" suggested to you by a well-meaning friend. Perhaps you have tried bending and squatting and stooping, or you may have bought gadgets or rollers or other contrivances guaranteed to make the fat "melt away like magic".

(Gov. Ex. 2-C-1)

THE SPECIAL BODY MASSAGE CREME which I have found so effective in reducing programs in my own establishments should be used. I have found this Creme very valuable to firm the skin as the fat melts away. When used it tends to tighten the skin so that those pounds you lose won't leave "sags" where extra pounds used to be. It is also beneficial when used as directed to beautify the contour of the throat, bust and upper arms, calves of legs, and thighs.

(Gov. Ex. 2-C)

This Creme acts as an astringent to take up the flabby flesh. Please understand that the Creme itself does not cause you to lose weight. I don't know of any Creme which will do that. But I have found astringents very valuable to firm the skin as the fat melts away. When used with massage, it tends to

tighten the skin so that those pounds you lose won't leave "SAGS" where extra pounds used to be. This Creme is pleasant to use, and is readily absorbed.

(Gov. Ex. 2-C-3)

Time passes quickly. If you are really serious and follow the suggestions given, you should be amply paid in securing the results desired. If you have only had one order of the Concentrated Foods, please bear in mind that it may require several more [239] packages to secure the results desired. I suggest that you continue the plan, so now that you have started you will not lose the benefits already attained.

After weight reduction is brought about, the Concentrated Foods may be taken occasionally as a general tonic to remain physically fit. I am enclosing an Order Blank. If you have a friend, or if you wish to order more food, return the Order Blank in the enclosed envelope.

(Gov. Ex. 4-F)

The plan sold by the respondents for reducing the weight of obese persons consists of a restricted diet and a box of tablets to be taken with said diet. Chemical analysis shows the tablets to contain kelp, small quantities of sodium and potassium oxides, iron, calcium oxide, and a trace of iodine. Microanalysis disclosed the presence in the tablets of alfalfa, wheat flour and soybean flour and small amounts of rhubarb root, parsley, spinach, lettuce, beet leaf, celery seed, capsicum fruit, carrot, asparagus, and animal meat tissues, and traces of yeast, kelp, and ginger rhizome. The "Special Body Massage Creme"

advertised and sold by the respondents was shown by a chemical analysis to contain phenol, menthol, camphor, eucalyptus, and water. (R. 46, 47, 50, 52; Gov. Ex. 4.)

There appeared on behalf of the Government an expert medical witness fully qualified by education and experience to give testimony concerning the medical issues involved in this case. (R. 59-64.) This witness gave extensive testimony concerning the condition of obesity and its causes, and the proper scientific treatment thereof. (R. 64-75.) He testified that the diet furnished by the respondents was a strict low-calorie diet supplying between 600 and 750 calories a day (R. 81, 84) and that it would [240] not be easy for an obese person, accustomed to eating more food, to follow such diet. (R. 80-92.) His testimony shows also that it would not be safe for persons with certain diseases and conditions and at certain ages to reduce as rapidly as might be done by following the diet of the respondents. (R. 78-89.)

The medical expert testified that the tablets furnished by the respondents, the ingredients of which he knew from the chemical analysis and the microanalysis, would be of no value in the treatment of obesity; and that any weight reduction accomplished by following the "plan" of the respondents would result solely from the low-calorie diet. (R. 87-92.) He stated that said tablets would not eliminate or relieve the hunger experienced by an obese person while following the low-calorie diet prescribed by the respondents. (R. 86-92.) By the respondents' directions the user is limited to ten tablets

daily. (Gov. Ex. 4-B-1.) The tablets weigh less than a gram each and supply about two calories each. (R. 83-87.) The average obese person consumes from 3500 to 4000 calories daily. (R. 83.) The expert testimony shows that the tablets will not furnish energy or "pep", are not a "general tonic", and will not keep one "physically fit". (R. 88.)

The evidence shows that after one loses a considerable amount of weight his skin becomes flabby, and this flabbiness will remain in mature people but may disappear to some extent in young people. The medical expert knew the ingredients of the "Special Body Massage Creme" sold by the respondents, from the chemical analysis thereof. He testified positively that massage with said creme would have no effect whatever, regardless of how long used, upon the flabby condition resulting from reduction in weight, or upon the contour of the throat, bust and upper arms, calves of legs and thighs. (R. 93-95.)

The respondents offered no expert medical testimony. The respondent Al Williams testified in his own behalf but was not [241] permitted to give testimony concerning the efficacy of his "plan" in reducing obesity because he was not qualified to give expert medical testimony.

Subsequent to the hearing in this case, and after a copy of the transcript of the hearing had been furnished to the respondents, notice was received by this office from the respondents that another attorney had been substituted in the case for the attorney who had represented them at

the hearing. This notice of substitution was signed by both of said attorneys. Thereafter there was received from the respondents a motion to reopen the case for the reception of additional testimony to be taken by depositions at Los Angeles, California. This motion was denied. There was also received later a motion by the respondents that "all possible scientific tests be made and obtained by the Post Office Department to determine the efficacy of the tablets sold by the respondents for the elimination or prevention of hunger when used in connection with the reducing plan." This motion was likewise denied.

Full consideration has been given to the original and supplemental briefs filed by the respondents, and to the legal authorities cited therein. The contentions made therein are without merit when considered in the light of the evidence in this case showing the falsity of the representations made through the mails by the respondents.

The evidence in this case clearly shows and I so find that the respondents operating under the names set forth in the caption hereof, are conducting a fraudulent enterprise through the mails as charged.

I, therefore, recommend that a fraud order be issued against all of the names set forth in the caption of the memorandum of charges, at Los Angeles, California.

(Signed) Vincent M. Miles
Solicitor.

To the Postmaster General.

[Endorsed]: Filed Jan. 7, 1946. [242]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To Al Williams and Al Williams Health System of Los Angeles, Inc., a corporation, and

To Richard L. North, Esq., their attorneys:

You and Each of You Will Please Take Notice that on Monday, February 11, 1946 at the hour of ten o'clock A. M. in the court room of the Honorable Peirson M. Hall, Judge of the U. S. District Court, defendant will move this Honorable Court to dismiss the above entitled action.

The motion will be made upon the ground that plaintiff has failed to state a claim upon which relief can be granted.

The motion will be based upon the records and files herein and upon the Points and Authorities attached hereto.

Dated this 1st day of February, 1946.

CHARLES H. CARR
United States Attorney
RONALD WALKER
Assistant United States Attorney
Attorneys for Defendant

[Endorsed]: Filed Feb. 1, 1946. [243]

[Minutes: Monday, February 11, 1946]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming on for hearing (1) Order to Show Cause filed January 8, 1946, why defendant should not be temporarily enjoined from interfering with mail of plaintiff, and (2) motion of defendant to dismiss for failure to state a claim upon which relief can be granted, pursuant to notice filed February 1, 1946; Richard L. North, Esq., appearing as counsel for the plaintiff, Chas. H. Carr, U. S. Attorney, by Ronald Walker, Assistant U. S. Attorney, appearing as counsel for the defendant;

At 1:20 P. M. court reconvenes herein for hearing in this case; and, on motion of Attorney North,

It is ordered that all of the allegations of unconstitutionality be stricken, and at the suggestion of the Court, and counsel for both sides consenting thereto, permission is granted the plaintiff to file an amended complaint, and that the exhibits attached to the original complaint be incorporated in the amended complaint by reference; and, that motion of the defendant to dismiss the complaint will be deemed to be lodged against and apply to the complaint so amended. Attorney North argues in opposition to motion to dismiss. Attorney Walker argues in reply.

It is ordered that said motion to dismiss stand submitted and decision on other matters deferred. [244]

[Title of District Court and Cause.]

AMENDED COMPLAINT

(To Vacate a Post Office Fraud Order and for Injunctive Relief upon the Ground that the Postmaster General has exceeded his Authority and upon Other Grounds)

Come now plaintiffs above named and each of them and by leave of the Court file this their Amended Complaint and complain of defendants, as follows:

I.

Jurisdiction is based upon the provision of U. S. C. A., Title 28, Section 41 (6), and is founded upon an action arising under the Postal Laws of the United States, to wit: The so-called [245] Postal Fraud Order Statute U. S. C. A., Title 39 Section 259 R. S., Section 3929; September 29, 1890, c. 908, Section 2, 26 Stat. 466, as amended, and hereinafter referred to as "the Statute".

II.

The object and purpose of this suit is to vacate a Post Office Fraud order purported to have been issued under the provisions of the Statute, and to enjoin the Postmaster of the City of Los Angeles, California, from withholding mail addressed to either of the plaintiffs or to Al Williams, Health Conditioner, Al Williams, Physical Conditioner, Al Williams Health System, The Al Williams Health System, or Williams Health System, and particularly from stamping upon all such mail the word "Fraudulent" and returning such mail to the senders,

upon the ground among others, that such order is void having been issued by the Postmaster General without authority and beyond the power granted to him by Congress.

III.

Portions of the Statute which are applicable to this action are as follows:

> "The Postmaster General may, UPON EVIDENCE SATISFACTORY TO HIM that any person or company is engaged in conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct Postmasters at any Post Office to which registered letters or any letters or mail matter arrive directed to any such person or company * * * to return all such mail matter to the Post Office to which it was originally mailed, WITH THE WORD 'FRAUDULENT' PLAINLY WRITTEN OR STAMPED UPON THE OUTSIDE THEREOF, AND ALL SUCH MAIL MATTER SO RETURNED TO SUCH POSTMASTERS SHALL BE BY THEM RETURNED TO THE WRITERS THEREOF * * *" (Emphasis added.) [246]

IV.

The plaintiffs are informed and believe, and upon such grounds allege that such fraud orders under the provisions of said Statute are uniformly signed by the Postmaster General ex parte and as a mere matter of routine when and as such orders are recommended by the subordinates designated by him to conduct such hearings.

V.

That at all times material to this action the defendant has been and now is the Postmaster in charge of the United States Post Office in the City of Los Angeles, California, and a resident and citizen of said state; that as such Postmaster he has the exclusive management of the Post Office in said city and of the receipt and distribution of all mail matter received at said City of Los Angeles through the medium of the United States mails.

VI.

That plaintiff Al Williams Health System of Los Angeles, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, and that said corporation is not, and never was, an officer or agent of or for plaintiff Al Williams or Al Williams, Health Conditioner, or Al Williams, Physical Conditioner, or Al Williams Health System or Williams Health System, and said corporation does not now have nor has it ever had any interest or participation whatsoever in any reducing plan or program or in any other business which is sold or conducted by use of the mails to any extent whatever. That plaintiff Al Williams is and for many years has been a resident and taxpayer of said City of Los Angeles; that in 1906 he became interested in athletics, and boxed and wrestled as a professional until 1916, when he became an instructor of the [247] wrestling team at the Olympic Club in San Francisco; that at the beginning of World War I he originated a system of rifle disarming for self-defense purposes and went to Washington, D. C. and gave a demonstration before the War College and was sent to Ft. Sills, Oklahoma, School of Arms, and from there

went to Camp Borden, Georgia, and from there to the Presidio in San Francisco, when the war ended and he resigned to go into the work of conditioning business and professional men, applying the system he introduced into the Army. That he opened his first establishment in San Francisco in 1920, and then one in Oakland, one in Pasadena, and three in Los Angeles up to 1931, and during the depression years he has been located in one establishment at 541 South Spring Street in the City of Los Angeles. That at one time plaintiffs' organization numbered about 250 employees, and they conditioned over 50,000 business and professional men and are still so operating at the said address. That plaintiff Al Williams studied weight reduction from the time he became a professional athlete and had much actual experience in the conditioning of boxers and wrestlers, and that he has by this experience learned how to decrease the weight and increase the energy by the use of selective foods and nutrition. That he first became interested in concentrated nutrition in 1935, and he has revised the eating schedule of at least 50,000 individuals, and finally sought to devise a means of eliminating the hunger feeling and desire to overeat, and in that year he began to experiment with concentrated food formulas and their effect upon his own body as well as upon many others, and thereby gained practical knowledge and experience concerning the concentrated food tables hereinafter referred to and which are a part of his reducing plan or program; that his only Post Office address is in said city and, except for the [248] acts of the United States Post Office Department hereinafter set forth, said plaintiff has enjoyed a reputation for honesty and integrity of a high order wherever his name is known.

VII.

That since the year 1935 plaintiff Al Williams has engaged in the business of reducing those who are overweight, by means of said reducing plan or program, which consists of prescribed diets, exercise, the taking with fruit juice, milk, soup or water, of certain concentrated food tablets which are hereinafter referred to as "said tablets" and which are composed only of about seventeen vegetable concentrates, for the purpose of taking away hunger and the desire to overeat, and also the use of a Special Body Massage Creme to tighten the skin and help correct flabby, fat tissue caused by the loss of weight.

VIII.

That the said business is not an unlawful one and said plaintiff has received and now has at least 2,000 testimonial letters attesting to the efficacy of the plan where other methods have failed of results, and attesting to the truth of all of the representations, pretenses and promises made by said plaintiff, and plaintiffs have never made any false or fraudulent representation, pretense or promise with regard to the said plan or program or said tablets or massage creme, of any kind or character whatsoever, and that no complaint of any kind has ever been made by any user or purchaser of said tablets or creme or of plaintiff's said reducing plan or program.

IX.

That plaintiff Al Williams is the sole owner and proprietor of said business which is located in said City of Los Angeles, California, and that a substantial part of said business has been conducted by him through and by the use of the United States mails in sending letters to

and receiving letters from [249] persons in interstate commerce throughout the United States and plaintiffs have been and are also receiving from various persons throughout the United States and elsewhere letters upon social and business subjects not connected in any manner with the aforesaid business.

X.

That on the 25th day of May, 1945, the Post Office Department filed and mailed to the plaintiff Al Williams a so-called memorandum recommending the issuance of a show cause order against the plaintiff Al Williams and against the other respondents therein, Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams Health System; and Williams Health System, in which said Department charged as follows:

> "Said party and concerns are obtaining and attempting to obtain various remittances of money through the mails from divers persons for tablets called "Foods that Take Hunger Away" together with "Al Williams Weight Reducing Plan" and for a "Special Body Massage Creme" upon pretenses, representations and promises contained in advertisements and in written and printed matter sent through the mails to the effect:
>
> That obese persons will lose weight easily and safely through use of the said plan regardless of the number of pounds they are overweight or of their age or failure to reduce by other methods;
>
> That the said plan does not include a "strict diet";
>
> That said tablets contain foods which eliminate hunger; and that the taking of these tablets in con-

nection with the said plan will prevent the users from becoming hungry; [250]

That a few days' use of the said plan and tablets will result in the user's loss of his desire to overeat and cause him to "feel full of pep and have more energy";

That said "Special Body Massage Creme" will eliminate "flabby flesh" caused by the loss of weight; and

That the said "Creme" will "beautify the contour of the throat, bust and upper arms, calves of legs and thighs";"

XI.

Together with said memorandum, the Post Office Department mailed to plaintiff Al Williams and said respondents on said date a letter in the form of an order to show cause, designating said memorandum as a "Specification of Charges" and informing the plaintiff that such charges would be taken up for disposition on the 20th day of June, 1945, at 10 o'clock a. m. at Washington, D. C., under the provisions of Sections 259 and 732 of Title 39 of the United States Code.

XII.

That plaintiff filed an answer to said charges and attended said hearing with his counsel, and that a copy of the transcript of the proceedings at said hearing, which includes a copy of said answer, is hereto attached, marked "Exhibit A" and made a part hereof.

XIII.

That there was and is no substantial evidence in fact adduced at said hearing in support of any of said charges,

and said charges were and are wholly unsupported by any substantial evidence of any fraud in fact.

XIV.

That all the evidence adduced at said hearing with [251] regard to the representations, pretenses and promises made by the plaintiffs came through the testimony of Inspector John W. Davis and appears on pages 13 to 44, both inclusive, of the transcript of said hearing (Exhibit A attached hereto), and that all such representations, pretenses and promises are true and have been made by plaintiff Al Williams to those who have used said reducing program.

XV.

That the charges against respondents at said hearing before the Post Office Department that they represented, pretended, or promised that the Creme used in their reducing program "will eliminate flabby flesh,"; "that the taking of said tablets in connection with said plan will prevent the users from becoming hungry"; and "that the said plan does not include a strict diet" are wholly without proof of any kind adduced at said hearing, and said charges were and are wholly unsupported by any evidence whatever, although proof was adduced at said hearing that plaintiffs represented, and they did represent, that said Creme, WHEN USED AS DIRECTED, would "help correct flabby, fat tissues"; "acts as an astringent to take up the flabby flesh"; "tighten the skin," would "firm the skin as the fat melts away," and "tends to tighten the skin so that those pounds you lose won't leave 'sags' where extra pounds used to be" and would "beautify the contour of the throat, bust and upper arms, calves of legs and thighs"; that said tablets,

WHEN TAKEN AS DIRECTED, would "help to take hunger away"; that the users "will not crave to overeat and will feel full of pep and have more energy" and without them will "become too hungry, tired and nervous to stay with a low caloric diet long enough to lose weight" and that said foods or tablets would, WHEN TAKEN AS DIRECTED, "take hunger away"; that the said reducing plan did not include "starvation" or "canary bird diets," and [252] that all of said representations so made are true, and that the contents of all of the exhibits which embody any and all of said representations, promises and pretenses are summed up in the testimony of the said witness, Inspector Davis of the Post Office Department.

XVI.

That the element of fraud or fraudulent intent is entirely lacking from the representations, pretenses and promises made by the plaintiff Al Williams, and said plaintiff has always attempted to conduct an honest and legitimate business and to give value received, as is evidenced by the statements appearing on page 27 of said "Exhibit A" as follows:

> "Q. What is the purpose of the Special Massage Creme?
>
> "A. This Creme acts as an astringent to take up the flabby flesh. Please understand that the Creme itself does not cause you to lose weight. I don't know of any creme which will do that. But I have found astringents very valuable to firm the skin as the fat melts away. When used with massage it tends to tighten the skin so that those pounds you lose won't leave 'sags' where extra pounds used to

be. This Creme is pleasant to use, and is readily absorbed,"

and that there was no proof whatever adduced at said fraud hearing tending to establish a fraudulent intent in making any of said representations, either by inference or otherwise.

XVII.

That all of the representations appearing on pages 16 to 39, both inclusive, of said "Exhibit A" are true; that plaintiff Al Williams has made the same representations to the public generally over a period of about 10 years and has applied his reducing plan in approximately 50,000 individual cases without one word of complaint from any of them, and he [253] has received during the said period of time over 2,000 voluntary and unsolicited testimonial letters attesting to the truth of said representations and claims and to the efficacy of said reducing program, a few of which letters he sought to introduce in evidence at said hearing (Exhibit A, pp. 134 to 142, inclusive, and page 190).

XVIII.

That the Post Office Department committed errors of law at said hearing and gross violations of the rights of respondents therein, in the following particulars, viz:

(1) In an attempt to prove that the representations made by plaintiff Al Williams were not true, the Post Office Department introduced at said hearing and relied solely upon the testimony of Dr. Lawrence E. Putnam, who was interned in Massachusetts hospitals from 1934 to 1938, was assigned to the Civilian Conservation Corps in 1938-39; was a medical officer for the Veterans' Ad-

ministration in 1939-41, and has since been with the Food and Drug Administration, where his duties include the examination of labels to determine whether or not they comply with the various sections of the Food, Drugs and Cosmetics Act and who practiced privately not exceeding three months and in the District of Columbia during evening hours and week-ends since 1942 (Exhibit A, pp. 59-63).

The testimony of Dr. Putnam consisted only of mere expressions of opinion on which witnesses and medical doctors might and do differ in their conclusions, and that no part of his testimony amounts to actual or substantial evidence of fraud, but said witness admitted that the question of whether or not the said tablets would "take hunger away" may be reduced to one of fact, in the following words, viz:

> "The Witness. I would say that testimonial had no value and I can tell you why it has no value. An [254] individual who takes two tablets with a glass of soup or a glass of fruit juice or a glass of buttermilk or skim milk and then has disappearance of hunger pains does not know whether the hunger pains disappeared due to the effect of the tablets or to the effect of the juice or milk or soup that went with it, or to both. He doesn't know anything. All he knows is that the hunger pains went away, if they did. To determine whether or not the hunger pains were eliminated, if they were, by the tablets, one would have to set up a control experiment and a scientifically controlled experiment can be done in any laboratory by the use of a kymograph that I mentioned and the balloon in the stomach and so

on. One could really find out the effect of the various things that are put into the stomach on hunger contractions that way." (Emphasis added.) (Ex. A, pp. 117-118.)

The question whether the plaintiff Al Williams should be branded a fraud for an indefinite period and his business and reputation completely destroyed rested solely upon the expression of opinion of this one doctor with limited practical experience, who testified as follows (Exhibit A, pp. 71-32, inclusive):

"Mr. Mindel. Doctor, do you consider the information requested in the self-analysis chart which is sent out by the respondent sufficient upon which to prescribe a treatment for all of these people?

"Mr. Lawson. I object to that on the same ground, your Honor.

"Assistant Solicitor. Well, I don't think it comes under the same ground because that is to the particular means that the respondent has for getting the [255] information that was read into the record, and he asked the question, as I understood him, as to whether the information obtained through the responses to that questionnaire would give a medical man sufficient information about a patient to give him proper treatment. Was that your question?

"Mr. Mindel. Yes, sir.

"Mr. Lawson. And yet it may not be sufficient for a physician but that wouldn't necessarily have any bearing upon the particular issue. I might state very frankly that this is a surprise to me to have the

case tried on the theory as to whether or not we were selling the preparation and plan here involved in such a manner that would comply with medical standards. I don't so understand the law. And I don't think that there is sufficient information here to put us on notice that that was the theory of the Government in this case.

"Mr. Mindel. Well, the word 'safely' appears in the first charge and that word certainly is clear in its meaning, and only a doctor can tell as to whether or not a particular regimen of conduct for an individual is safe for his health.

"Mr. Lawson. Well, we are being measured here, Mr. Solicitor, by medical standards and we have not been charged in that capacity. That is the objection that I make.

"Assistant Solicitor. Well, understand me, Mr. Lawson, we don't hold here in the Department that medical standards in the sense of a practicing physician must be followed. We don't have any right legally to take the position that treatment couldn't be sold through the mails, but we do have the right [256] under the Statute—the Postmaster General has the right—to determine by hearing medical testimony whether the representations are true or false. Now, the Government says that the respondent is representing that this treatment, that this plan, will cause one to lose weight 'easily' and 'safely'. Now, I don't know whether your literature so represents until I give it the most careful examination. Let's suppose that it does represent that it can be safely taken with no limitation as to physical condition or

anything of the kind and that that representation turns out to be false according to medical testimony. Then that is the basis for a fraud order."

It appears to be the position of the Post Office Department that the only way for obese persons to reduce safely is to employ a doctor, and the real complaint against plaintiff Al Williams, when boiled down, seems to be that he is not a doctor, and that doctors are not included in his reducing program. (Exhibit A, pp. 67-75, inclusive.)

The complaint that plaintiff is not a doctor becomes more apparent and persistent when the witness Dr. Putnam testifies concerning his claim of inadequacy of the information questionnaire used and sent out by plaintiff. The information sought by plaintiff in that questionnaire includes: (1) Height, (2) weight, (3) greatest and lowest weight in last 10 years, (4) age, (5) waist measurement, (6) hip and bust measurements, (7) nationality, (8) occupation, (9) can you exercise? (10) use tobacco? (11) use liquor? (12) use soft drinks? (13) use laxatives? (14) elimination good? (15) any operations? (Exhibit A, p. 28.) The witness Dr. Putnam states that a doctor would require the following necessary information, viz: (1) age, (2) sex, (3) occupation, (4) history of diseases, (5) family [257] situation, (6) laboratory tests, (7) income. (Exhibit A, pp. 28 and 67.) Yet this key witness maintains that the questionnaire used by plaintiff Al Williams is inadequate to determine whether or not it is safe for the individual to reduce (Exhibit A, p. 73), although the information sought by plaintiff is more extensive and illuminating, but evidences no interest in income.

(2) That at least two other medical doctors are diametrically opposed to the opinions expressed by Dr. Putnam in his testimony, and express the opinion that the representations made by plaintiff with regard to said tablets are true, appears by affidavits which are hereinafter set forth and which were filed by plaintiff with the Post Office Department on or about August 10, 1945, in support of a motion to reopen the case for the purpose of taking and receiving in evidence the depositions of Doctors of Medicine who are familiar with said reducing program and whom plaintiff Al Williams was unable to produce at said hearing for the reason that said witnesses resided in Los Angeles, California, and could not go to Washington, D. C. because of the great demands upon them professionally at that time, as well as the difficulties presented by war-time transportation; that plaintiff was not aware that the issues would depend to any extent upon opinion evidence and he was unacquainted in Washington at the time of said hearing and unable to produce any expert evidence in support of said representations.

That by the denial of said motion to reopen said case for the reception of further expert testimony, the Post Office Department closed a very reasonable avenue to the truth and denied respondents therein the right to establish their defense to said charges, which right has been denied them by reason of the arbitrary, peculiar and unreasonable procedure of the Post Office Department in requiring them to defend themselves with medical [258] testimony 3,000 miles from their place of residence and from their acquaintance with medical practitioners.

(3) The Post Office Department further deprived respondents therein of a fair hearing and committed gross prejudicial error at said hearing in permitting the witness Dr. Putnam to testify (Exhibit A, pp. 75-78, inclusive), as follows:

"Mr. Mindel. I stated that in 2-C respondent writes that—well, these are his exact words, (reading):

> "'Letters which tell of 10-pound losses in three days, 35-pound losses in 30 days, 73-pounds in six months. I assure you that these cases are not rare exceptions.'

I say are there some obese persons who would be harmed by such a rapid loss of weight?

"Mr. Lawson. Just a moment. I object to that. It is not a competent question as related to the particular statement in Exhibit 2-C. The question involved there is as to whether or not that specific representation is true or false, and I don't know what particular charge that is related to in the memorandum of charges.

"Mr. Mindel. It is under safety, Mr. Lawson.

"Mr. Lawson. Under the first one?

"Mr. Mindel. Yes, sir. We are still dealing with safety.

"Mr. Lawson. Well, I still submit that the question does not relate to the specific representation made here. And if he were asked to decide that question it would still be incompetent because the conclusion of the witness is certainly not based upon any evidence before the court.

"Assistant Solicitor. Except the representation in the literature.

"Mr. Lawson. The fact that it was made. Its truth [259] or falsity, there's certainly no basis for his opinion because it doesn't show that he made any examination of the customers.

"Mr. Mindel. Well, for the purposes of the question I assume that we can accept the respondent's representation. He is making that representation and he is saying that it is safe. We are not adding anything to it except to question the doctor as to whether such a loss would be safe.

"Assistant Solicitor. The first question is whether that representation is true or false. Whether it would accomplish that. If it will accomplish that, then would it be safe. I am not inclined to sustain the objection because of that question of the safety of the respondent's treatment for anyone and it is advertised to the public generally. It is definitely an issue under the first charge and he avers that can be accomplished. That is not in issue. It isn't charged that is false but he is asserting that can be accomplished by this treatment. So, asserting that, then isn't the question competent whether that would be safe when he asserts that that much can be taken off by his treatment? The truth or falsity of that statement is not an issue here but the respondent asserts that can be done and I think for that reason it would be competent. I will be glad to hear you on it further, Mr. Lawson.

"Mr. Lawson. I don't know as I could add anything to it except that this witness has testified as a

physician—and I am not quarreling with his qualifications in expressing an opinion—but he has stated as a physician and as any physician would testify that there [260] should be an individual examination in each case. That is medical treatment. Now, there isn't any proof here as to just what may have been done in the particular cases involved here, that is, as to the particular persons who purchased these tablets, unless we indulge in the assumption that the sale was not properly made under proper information. It is just jumping from a conclusion that because it wasn't scientifically, let us say, administered or sold that it wouldn't be safe. That is the vice of this whole testimony in my judgment.

"Assistant Solicitor. No, he is offering for sale a treatment through the mails which is advertised as being capable of effecting rapid reduction in weight, and it is charged in the memorandum of charges that the respondent also advertises that such rapid reducing may be accomplished safely. Therefore, there is an issue of whether such rapid reduction can be accomplished safely. So for that reason I think it is entirely competent. For the reasons I have stated I am so ruling.

"Mr. Mindel. Will you answer the question Doctor. Are there some obese persons who would be harmed by such a rapid loss of weight?

"The Witness. Yes, there are. As I have explained before, the patient with the previous tuberculosis may become ill. A patient who had diabetes, for example, might be thrown into acidosis by sharp reduction in diet, which would bring about com-

bustion of his own fat and in an improper manner so that the fat gave rise to acetone bodies or acid bodies in the urine and the patient would be thrown into acidosis, which is a serious condition."

There is no evidence of the condition of the persons referred to in respondents' advertising and respondents therein [261] did not offer to sell their reducing plan to anyone who would purchase it but sought to secure proper information from each purchaser in order to determine whether or not they could SAFELY follow the program. The testimony of Dr. Putnam that there are SOME obese persons who would be harmed by such a loss of weight was entirely incompetent, immaterial and irrelevant to the issues involved, though it might not have been so had evidence been introduced at the hearing to the effect that plaintiff had offered and sold the reducing program to everyone, regardless of their physical condition and history. The evidence is quite to the contrary. Neither was there any evidence that the persons referred to in the representation had either tuberculosis or diabetes.

(4) That the Post Office Department committed prejudicial error and arbitrarily deprived plaintiff Al Williams of a fair and impartial hearing in refusing to permit him to testify at said hearing with regard to his experience with said tablets and the results of his use of them, extending over a period of several years, during which he experimented with them upon himself and many others, his testimony appearing (Exhibit A, pp. 126-130, inclusive), as follows:

"Q. When did you first become interested in concentrated nutrition?

"A. About 1935. At that particular time concentrated nutrition came to the fore, just gradually, and it was brought to my attention by newspaper items. It seemed to appeal to me because there always had been a problem to keep the discipline of eating among the clients. When we make a revision of food analysis, of which I have made over 50,000, they give me their habits of eating and then when we make the changes there was always a hardship for them to follow the change [262] because of the hunger feeling and desire. So when concentrated nutrition came into vogue the particular thing that inspired me most was that I read an article in the paper that a local chemist there had devised a tablet for Captain Byrd to go to the South Pole or North Pole, I forget which one now, and the notice said it would not require so much space. That kind of made me inquisitive about concentrated nutrition so I looked up some of the people who at that time were in that particular business and I began to experiment myself with concentrated food formulas. Oh, I experimented for, on myself personally, on my own body, probably about two years, from 1935 to 1937, with amazing results. I go on fasts. In fact, I went on a fast one time for thirteen days by only taking the tables in water and I played two games of handball at the end of the thirteenth day. That proved to me that there was some value to the tablets. Then I experimented with the tablets by eating one meal a day and then the tablets. Then again two meals a day and the tablets. Over the period of time I derived conclusive proof within myself that there was a good deal of value to concentrated nutri-

tion. And I experimented in my own family. In fact, my mother-in-law who at the time she was sixty-eight years of age had lost all the desire to walk or do anything of that type so I changed her food plan and made her eat some of those tablets and amazing as it may seem she got some of her energy back, some of her ambition, and now even to this day she goes downtown at seventy-eight.

"Mr. Mindel. I object to that sort of testimony, Mr. Solicitor, where Mr. Williams is trying to testify [263] as to the effects of these tablets upon his mother-in-law or anyone else. He has not qualified as a medical expert and certainly he can't testify as to what effects were brought about by these tablets in their use.

"Mr. Lawson. That goes to the weight, Mr.—

"The Witness. (Interposing) I was experimenting then.

"Mr. Mindel. I understand. But certainly Mr. Williams is not by any means qualified as a medical expert to testify upon the efficacy of any preparation.

"Mr. Lawson. He is not testifying as a medical expert.

"Mr. Mindel. He has stated as his conclusion that his mother-in-law by the use of these tablets had a revived energy; that she was lethargic prior thereto but when she used these tablets she had surprising new energy, and that certainly is a conclusion which he is unqualified to make.

"Assistant Solicitor. Mr. Lawson, here in the Department we have testimonials offered in these

cases by the operators of various businesses selling medical preparations through the mails, testimonials to prove anything,—I mean that will assert anything about any medicine that is put on the market—and if we consider them of no value whatever in the place of medical testimony they would be of no value in the record, and there was a recent case here in the District of Columbia where the court held that we properly refused to admit testimonials. Well, isn't the testimony of a lay witness just the same as to the effect of any medicine or concentrated foods?

"Mr. Lawson: Not in my opinion if it is the result [264] of direct experience by one who is qualified in the general field of health conditioning. I don't know if a physician could be considered in some cases. I have no particular reference here of course, but there are some medical men whose field would be entirely apart from anything connected with physical activity and the effect of foods and exercise upon the human body than perhaps one who had large experience in the particular field might be more qualified. The matter of expert opinion—the admissibility of that testimony has been widened lately and the only question will be the weight to be attached to it. That's up to the trial court or whoever sits in judgment on it. But that's the general trend I would think of all of the decisions. I am not so familiar with those decisions naturally as you are but I think in some of the circuits they are accepted; testimonial letters are accepted in the absence of proof that they are not false.

"Assistant Solicitor: Well, it has been an invariable rule here since I have been here in the Department—I have felt that way about it—that testimonials can be of no value because they are testifying to the efficacy of some drug or some tablet or some plan for the treatment of a physical condition about which the layman knows nothing. Take an arthritic for example, he will give a testimonial that he is much improved, he has taken such and such a preparation. The medical testimony will show that the symptoms of arthritis come and go. That's rather an extreme example. He doesn't know if the preparation had any effect whatever. Nature might have taken care of the situation. We stray from the testimony of those qualified in the field of science. [265] In this case we consider caloric values and what caloric values in food there must be to sustain one. I think the Doctor has already testified that the diet is a reducing diet. I don't think there is any question about that being a reducing diet. But when you come down to a scientific question as to the food value of these tablets I cannot conceive though that he would be qualified to testify concerning them, as to their efficacy. I have heard a good many cases since I have been here on the question of those who are competent to give such testimony, who are qualified. I don't want to be arbitrary about this matter but if you have got any authorities that show me to be wrong about this I will be very happy to hear them. But we frequently have this very situation where the respondent has read a few medical books and attempted to evaluate the statements made in them and we say

to give an opinion on a medical question he must be qualified to give such opinion, have a scientific background. So at least nothing yet has been said by the witness or offered to qualify him as an expert medical witness and this is certainly a medical question. I will be glad to hear from you further on the subject.

"Mr. Lawson. Well, I assume that it will be merely a matter of weight rather than admissibility. If that is your ruling, why, that's that.

"Assistant Solicitor. That is my invariable ruling here, Mr. Lawson. If I relaxed the rule in your case I would have to relax it in all but that is my invariable ruling about laymen testifying concerning medical questions. Now, you have the same opportunity as the Government has—any respondent has—to [266] introduce medical testimony and it is frequently introduced here. That isn't denied you. But we can't accept an unqualified statement from an unqualified witness concerning such matters.

"Mr. Lawson. Well, all I can say is that with the time at our disposal I doubt very much whether we would have time to get medical opinion."

The refusal to permit the witness Williams to so testify was a violation of a well recognized exception to the rule as to expert witnesses, which exception permits a witness possessed of special training and experience to testify to his opinion when it will tend to aid in reaching a correct conclusion. The witness possessed valuable information derived from actual experience with the tablets over a long period of time, during which he had been in the business of conditioning men, which includes the

important subject of weight reduction, and he was eminently qualified to supply expert and pertinent testimony.

(5) Plaintiff Al Williams and the other respondents before the Post Office Department were not charged with practicing medicine without a license but are virtually condemned because they are not doctors of medicine and are offering a reducing program which they have chosen through actual experience and application over a period of many years. See the following testimony of Dr. Putnam in Exhibit A, pp. 107-108:

"Q. Now, as I understand your testimony, you believe that anybody who may be obese should first consult a physician if he desired treatment. Is that your position?

"A. I think that is the sensible thing to do.

"Q. Well, you say sensible thing, you think that should be done don't you?

"A. I certainly think that we should be sensible. [267]

"Q. And you do not believe that any treatment without the advice of a physician is a proper treatment?

"Mr. Mindel. I object to the generality of the question. I think it should be made specific with regard to obesity.

"Mr. Lawson. Well let us understand—

"The Witness. (Interposing) I was just about to ask you whether you meant treatment for obesity.

"Mr. Lawson. Yes. We will restrict it to that because that is what we are interested in.

"The Witness. As I said before, the sensible way would be to have medical supervision."

(6) That the key witness for the Post Office Department admitted (Exhibit A, p. 119) that the plaintiff's principal representation was true, in the following testimony, viz:

"Q. If the tablets, Doctor, were taken as it is indicated that they may be with water, what effect would that have in dispelling hunger pains?

"A. Practically none.

"Q. You have indicated that there is a possibility or I believe you have, that if one takes these tablets with fruit juice or buttermilk or the others the hunger pains might disappear.

"A. Yes, they may.

"Q. Is that a temporary effect or is that a lasting effect?

"A. Of course it is temporary."

The instructions given by respondents in said proceedings for the taking of said tablets appears on page 36, Exhibit A, as follows:

"Take 1 tablet before breakfast, 2 at noon, and [268] 2 tablets before dinner. Any time during the day when you feel hunger take 1 or 2 tablets (not to exceed 10 tablets). DON'T chew the tablets. Swallow them with one-half glass of fruit juice, skim milk, or if it is a cold day take with hot soup or broth. If at work and you cannot have the fruit juice, take them with water. The day that you are exclusively on the Food Tablets, take 2 or 3 tablets during the day when hungry. Take tablets with

water, fruit juice, soup or skim or buttermilk. When following a 2 meal day food plan, go every 4th day taking only the food tablets. When following a 3 meal day food plan, go every 3rd day taking only the concentrated Food Tablets."

XIX.

That on December 10, 1945, the Postmaster General and said Post Office Department nevertheless made an order in words and figures as follows:

"POST OFFICE DEPARTMENT
WASHINGTON

"Order No. 29990 Dec 10 1945

"It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that AL WILLIAMS; AL WILLIAMS, HEALTH CONDITIONER; AL WILLIAMS, PHYSICIAL CONDITIONER; AL WILLIAMS HEALTH SYSTEM; THE AL WILLIAMS HEALTH SYSTEM, and WILLIAMS HEALTH SYSTEM, and their officers and agents as such, at Los Angeles, California, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of sections 259 and 732 of title 39, United States Code, said evidence being more [269] fully described in the memorandum of the Solicitor for the Post Office Department of the date of December 6, 1945, and by authority vested in the Postmaster General by said laws the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said party & concerns and you are hereby directed to inform

the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the Department.

"And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said party & concerns to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the words 'Fraudulent: Mail to this address returned by order of Postmaster General' plainly written or stamped upon the outside of such letters or matter. Where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed to send such letters and matter to the appropriate dead letter branch with the words 'Fraudulent: Mail to this address returned by order of Postmaster General' plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

(Case No. 44237-F)

(Signed) J. M. Donaldson
Acting Postmaster General

To the Postmaster.
Los Angeles, California." [270]

And said order was received by the defendant on December 12, 1945, and a copy thereof was received by plaintiffs on December 17, 1945.

XX.

That by reason of being unsupported by any substantial evidence in fact, and by reason of the facts herein alleged, said order is void and issued without and beyond the authority and jurisdiction of the Postmaster General, and of said Post Office Department, and beyond the authority conferred upon them by the Acts of Congress.

XXI.

That Exhibit A hereto attached and the aforesaid order constitute the whole of the record of said proceedings before the Post Office Department except certain exhibits which are unimportant to this action, and said order is based only on said record and upon a memorandum embodying findings of fact made by Vincent M. Miles, as "Solicitor" of said Department, a copy of which findings of fact is hereto attached as "Exhibit B" and made a part hereof.

XXII.

That there was no credible or substantial evidence produced or presented at said hearing in support of the alleged finding that plaintiffs are or were at any time engaged in obtaining money through the mails by means of false and fraudulent pretenses, representations or promises, or that plaintiffs are or were engaged in any fraudulent conduct or representation of any kind or character whatsoever, or that plaintiffs had any intent to defraud, as alleged in said charges, or at all.

XXIII.

That said findings of fact do not support said order and do not in fact find any fact establishing or tending to establish that plaintiffs at any time were engaged in

any unlawful [271] business or that plaintiffs or either of them were engaged in making any false or fraudulent representation, pretense or promise of any kind or character or that plaintiffs or either of them had any fraudulent intent, but said findings and said record upon their face establish that the plaintiff Al Williams was at all times engaged in a lawful and highly legitimate business which has brought substantial benefit to thousands of individuals without injury to any.

XXIV.

That said record, "Exhibit A," and said findings of fact, "Exhibit B," affirmatively establish an absolute good faith on the part of the respondents named therein and a complete absence of actual fraud and of any fraudulent intent whatsoever.

XXV.

That plaintiff Al Williams and the other respondents in said proceedings were deprived of a full and impartial hearing and their said rights grossly violated, for the reason that they came to said hearing with no notice or intimation whatever, nor could they fairly be charged with the knowledge, that the issues or any thereof would depend upon the opinion testimony of a medical doctor; that respondents therein were unacquainted in Washington, D. C. and were therefore entirely unable to there present medical testimony and so stated at said hearing. That on or about August 10, 1945, said respondents filed their motion to reopen the case before the Post Office Department in said matter, in order to and for

the purpose of taking depositions of Medical Doctors in Los Angeles who would refute all of the material testimony of said witness Dr. Putnam, and said respondents then filed with the Post Office Department, in support of said motion, the affidavits of two Doctors of Medicine, in words and figures as follows: [272]

(Entitled Before the Post Office Department)

"State of California)
) ss.
County of Los Angeles)

"Charles J. Pflueger, being first duly sworn, deposes and says: That he is a Medical Doctor duly licensed to practice in the State of California and practicing in the City of Los Angeles in said State.

"That he is familiar with the reducing plan heretofore used and advertised by Al Williams of said City of Los Angeles and with the tablets which have been used by said Williams in connection with said reducing plan and which said Williams has claimed would take away hunger; that said tablets contain beet leaves, carrot leaves, lettuce, parsley, kelp, celery, asparagus, spinach, watercress, celery seed, rhubarb stock, rhubarb root, brewers' yeast, chili powder, escarole, endives, powdered liver, stomach powder, heart muscle, alfalfa, and wheat flour, and that said tablets used in connection with said reducing plan and as heretofore suggested and advertised by said Al Williams will, in the presence of hunger and when one is taken before breakfast, two at noon and two before dinner and at other times during the

day until no more than ten have been taken, in the opinion of affiant, prevent the user from becoming hungry and result in the loss of his desire to overeat and will cause him to feel full of pep and have more energy; that it is the opinion of affiant that obese persons will lose weight easily and safely through the use of said reducing plan, regardless of the number of pounds they are overweight or of their age or failure to reduce by other methods; that said reducing plan does not include a strict diet and that, in the opinion of [273] affiant, said tablets used in connection with said plan contain foods which eliminate hunger, and that affiant will so testify under oath at any hearing held in the City of Los Angeles, California, and will then and there give the reasons upon which said opinion is based.

"That it was impossible for affiant to go to Washington, D. C. on June 20, 1945, and it is impossible for affiant to absent himself from the City of Los Angeles for the purpose of traveling to Washington, D. C.

(Signed) CHARLES J. PFLUEGER, M.D.

Subscribed and Sworn to before me this 11th day of August, 1945.

(Seal) GERTRUDE BERG

Notary Public in and for the County of Los Angeles, State of California.

My Com. exp. 1/30/46."

(Entitled Before the Post Office Department)

"State of California)
) ss.
County of Los Angeles)

"M. John Beistel, being first duly sworn, deposes and says: That he is a Medical Doctor duly licensed to practice in the State of California and practicing in the City of Los Angeles in said State.

"That he is entirely familiar with the tablets which have been used by Al Williams of Los Angeles in connection with his reducing plan and which said Williams has claimed would take hunger away; that said tablets contain beet leaves, carrot leaves, lettuce, parsley, kelp, celery, asparagas, spinach, watercress, celery [274] seed, rhubarb stock, rhubarb root, brewer's yeast, chili powder, heart muscle, escarole, endives, powdered liver, stomach powder, alfalfa, and wheat flour, and that said tablets will, when one is taken before breakfast, two at noon and two before dinner and at other times during the day until no more than ten have been taken, in the opinion of affiant, prevent the user from becoming hungry, and result in the loss of his desire to overeat and will cause him to feel full of pep and have more energy. That, in the opinion of affiant, said tablets contain foods which eliminate hunger, and that affiant will so testify under oath at any hearing held in the City of Los Angeles, California, and will then and there supply the reasons upon which said opinion is based.

"That it was impossible for affiant to go to Washington, D. C. on June 20, 1945, and it is impossible

for affiant to absent himself from the City of Los Angeles for the purpose of traveling to Washington, D. C.

(Signed) M. JOHN BEISTEL, M.D.

Subscribed and Sworn to before me this 11th day of August, 1945.

(Seal) GERTRUDE M. BERG

Notary Public in and for the County of Los Angeles, State of California.

My Com. exp. 1/30/46."

But said motion was denied by the Post Office Department upon the alleged ground that the matter had been pending a long time and it had no facilities in the City of Los Angeles for the taking of such depositions, although there is in said [275] city a United States Attorney with a fully equipped and acting office and staff of assistants.

XXVI.

That the Post Office Department further grossly violated the rights of said respondents and deprived them of a fair hearing by conducting said hearing at Washington, D. C., instead of at Los Angeles, California, and by conducting such hearing before itself instead of before a United States District Court, and by grossly violating all of the civil rights of respondents therein, including the right of presumption of innocence and to a trial by jury, and for said reasons and those hereinbefore alleged, the said order is void and of no effect and was issued without substantial evidence in fact and beyond the jurisdiction of the Post Office Department and of the

Postmaster General and beyond the authority conferred or intended to be conferred by Congress.

XXVII.

That plaintiff Al Williams has been conducting his said business of weight reduction and conditioning of business and professional men for about 25 years, during which time he has revised the eating schedule of at least 50,000 persons and he has not had one complaint of any kind from any of them but has received several thousand voluntary and unsolicited letters of grateful commendation from users of his said reducing plan and program. That plaintiff's said business is highly legitimate and legal and has always been conducted in accordance with high ethical and moral standards, in which the wide experience of plaintiff Al Williams in physical conditioning and weight reduction has brought great benefit and happiness to many thousands of people.

XXVIII.

That plaintiffs have been branded by the Post Office [276] Department as a fraud, upon the opinion of one doctor that the degree of cessation of hunger pains is in direct proportion to the number of calories put into the stomach (Exhibit A, pp. 116-117), when plaintiffs are informed and believe and upon such information and belief allege that the concensus of opinion of Doctors of Medicine differs widely from such a theory.

XXIX.

That on or about August 17, 1945, with the desire to be fair and to cooperate with the Post Office Department, plaintiff Al Williams voluntarily consented that his mail should be withheld from delivery at Los Angeles, Cali-

fornia, pending the decision of the Post Office Department upon the issues presented at said hearing, and since said date a substantial amount of mail has been received and is being received daily at the Post Office in Los Angeles from various persons throughout the United States, addressed to plaintiff Al Williams and to all of the other respondents in said proceedings in connection with the said business and containing remittances of money orders and currency, and that there has also since been received at said Post Office a substantial number of letters addressed to plaintiffs from places throughout the United States and elsewhere upon social and personal business subjects other than said reducing business; that mail addressed to plaintiffs or either of them and to the said respondents will continue to be received daily at said Post Office so long as plaintiffs shall continue to live at Los Angeles and so long as their names shall be listed in any directory in said city; that plaintiff Al Williams owns his own home and place of residence and other real property in Los Angeles and desires and expects to reside there during the remainder of his lifetime.

XXX.

Plaintiffs have, since the making of said order, been [277] informed by the defendant that, pursuant to said order and only by reason thereof, he will deliver no more mail addressed to plaintiff Al Williams or to any other of the five designations named therein, and that since December 12, 1945, all mail addressed to plaintiffs or either of them, and since August 17, 1945, all mail

addressed to plaintiff Al Williams and to the other of the respondents in said proceedings before the Post Office Department, has been and plaintiffs fear that it will in the future continue to be stamped upon the face of the envelope "Fraudulent" or "Fraudulent: Mail to this Address returned by Order of Postmaster General", and thereafter returned to the sender in all cases where the address of the sender is contained on the outside of the envelope, and that all other of such mail is being and will be so stamped and sent to the dead letter office of the Post Office Department, and plaintiffs are informed and believe and upon such ground allege that the defendant will continue in the future to so dispose of all mail received hereafter at such Post Office which is either addressed to plaintiffs or either of them or to Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams Health System; Williams Health System, or to plaintiffs under any other designation by which plaintiffs or either of them may be known, although plaintiff Al Williams Health System of Los Angeles, Inc., a corporation, is not named in said fraud order.

That on August 17, 1945, when plaintiff Al Williams voluntarily consented to the withholding of his mail from delivery at the Post Office in Los Angeles, California, until the determination of the Post Office Department as to whether or not a fraud order would be issued, there were being received at said Post Office daily approximately 50 letters addressed to the plaintiff Al Wil-

liams and about 450 letters daily addressed [278] to said plaintiff under the other designations set forth in said fraud order.

XXXI.

That plaintiffs have no plain, speedy or adequate remedy at law and that they will suffer great and irreparable loss and injury unless the defendant is prevented from carrying out his said intentions, in that plaintiffs are and will be and become advertised to the entire world as a cheat and fraud for the reason that any person who may send a letter by mail addressed to plaintiffs or any or either of them by their true or any other designation, including those mentioned in said fraud order, at Los Angeles, California, with said persons' return address designated thereon, will have said letter returned to him stamped on the face of the envelope thereof the word "Fraudulent" which, in effect, will mean and constitute to all of said persons that plaintiffs are being branded by the United States Government as a fraud and that by said withholding, stamping and returning of the plaintiffs' mail, their good reputation which they have cherished and maintained, to say nothing of said reducing business and the extensive conditioning business of plaintiff The Al Williams Health Syhtem of Los Angeles, Inc., which have been built up over a period of many years and are now successfully operated in Los Angeles, will be ruined, and plaintiffs will, by reason of said acts of the Post Office Department, become unable to earn a liv-

ing or to successfully engage in any business or means of earning a livelihood.

That said order, if continued in existence, will unjustly cause plaintiffs to become despised and shunned personally and in business and that only the immediate issuance of a restraining order, as prayed for herein, will prevent such irreparable injury, for the reason that every day's delay in the issuance of said restraining order will cause and permit [279] plaintiffs to be branded as aforesaid before a great many additional persons and their good name and business will thereby be injured to such additional extent.

Wherefore, plaintiffs pray:

(1) That an order be issued by the Court temporarily restraining defendant from carrying out the said order of the Postmaster General, and that, pending hearing upon the merits of this action, the court issue an order to show cause requiring the defendant to show cause why he should not be temporarily enjoined and restrained from carrying out the said order; that upon the hearing of said order to show cause, a temporary injunction issue until the trial herein;

(2) That upon trial of this action upon the merits the said order of the Postmaster General be vacated and decreed void and that the defendant be perpetually enjoined from carrying out said order and directed to proceed and continue with the regular delivery of all mail ad-

dressed to plaintiffs and to the names designated in said fraud order in the usual and regular course of his duties;

(3) That plaintiffs be awarded their proper costs and disbursements herein, and such other and further relief as may appear just and equitable.

RICHARD L. NORTH
Attorney for Plaintiffs [280]

[Verified.] [281]

(Here, by leave of the Court, is incorporated by reference to "Exhibit A" of the original Complaint, a true copy of the Transcript of the Proceedings before the Postmaster General.) [282]

(Here, by leave of the Court, is incorporated by reference to "Exhibit B" of the original Complaint, a true copy of the Findings of the Postmaster General)

Received copy of the within Amended Complaint this 14th day of February, 1946. ....., Attorney.... for defendants.

[Endorsed]: Filed Feb. 15, 1946. [283]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF OPINION

Honorable Peirson M. Hall, Judge Presiding.

Los Angeles, California, March 4, 1946

Appearances:

For the Plaintiff: Richard L. North, Esq., 402 Merritt Building, Los Angeles, California.

For the Defendant: Charles H. Carr, United States Attorney; by Ronald Walker, Assistant United States Attorney. [286]

Los Angeles, California; March 4, 1946;

10:00 o'clock A. M.

The Court: In the matter of Williams v. Fanning, the matter was submitted and the parties have nothing further to offer?

Mr. Walker: Nothing further on behalf of the defendant.

Mr. North: Nothing further, your Honor.

The Court: In this matter I haven't written an opinion but I made a very short memorandum because the matter is one of injunction and urgency so I want to announce my opinion this morning.

The Los Angeles Postmaster, by the United States Attorney, seeks dismissal of this action to enjoin him from enforcing a fraud order against the plaintiff on the ground that the Postmaster General is an indispensable party.

There is a welter of decision on the subject, so much so that in 1940 the Supreme Court remarked, in Brooks v. Dar, 313 U. S. 354, that they were "not disposed to attempt a critique of the authorities."

There is direct conflict between the Sixth Circuit and the Ninth Circuit, and the District Court of New Jersey, which is in the Third Circuit, in July of 1945 followed the Sixth Circuit in Pinkus v. Walker, 61 Fed. Supp. 610.

In the Sixth Circuit cases (there are two of them), Jarvis v. Shackelton, 136 Fed. (2d) 116 (June 1943), and [287] Greer v. Kline, 148 Fed. (2d) 380 (March 1945), as well as Pinkus v. Walker, all adhere to and follow the doctrine of the American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, to the effect that if there is no substantial evidence of actual fraud in fact, and only opinion evidence before the Postmaster General, to support a fraud order, then the order of the Postmaster General is beyond his authority in law and he is not an indispensable party.

The McAnnulty case, as recently as February 4, 1946, was cited by the Supreme Court in a selective service case, Estep v. U. S., as being authority for the proposition that the courts have the power to review factual findings to determine whether or not, by virtue of the lack of evidence, there has been an excess of lawful authority of the administrative body or board.

In the instant case, except for the evidence of mailing and a chemical analysis of some food tablets—and the

chemical analysis bore out the plaintiff's representations—there was no evidence at all before the Postmaster General except the testimony of an employee of the Food and Drug Administration of the government, who testified as a medical expert as to the efficacy, in his opinion, of plaintiff's plan of reducing obesity. Although the record shows that upwards of 50,000 persons had used plaintiff's plan in whole or in part, which included not only dieting but exercises in some cases as well, not one of them, nor any other person, [288] was produced to testify as to any matter at all. The plaintiff was excluded from testifying as to his actual experience with his plan on persons other than himself. And on a motion for reopening to permit medical testimony on behalf of the plaintiff, the motion was denied although the hearings were held in Washington, D. C., and the plaintiff had no notice of the plan of the Postmaster General to produce or rely on medical opinion evidence.

The McAnnulty case is clearly authority for the proposition that the statute does not authorize the Postmaster General to be an arbiter of medical opinion and to use the terribly effective power of the denial of the mails based solely upon that opinion. In Hannegan v. Esquire, decided February 4th of this year, where the Supreme Court construed the second class mailing statute, they held there that the powers, although just as great under that statute in the Postmaster General as in the fraud statute, did not authorize him to be an arbiter of what was literature or what was art or what was moral.

In the instant case, having read the entire transcript, I find that there is no substantial evidence to support the fraud order of the Postmaster General. And I would follow the decisions of the Sixth Circuit were it not for the fact that this circuit, in Nehr v. Harwood, 128 Fed. (2d) 846, decided in 1942 and is the last expression of this circuit on [289] the subject, has specifically held that the McAnnulty case is not authority for the non-joinder of the Postmaster General as a party. The case, as I have indicated, is in direct conflict with the decisions of the Sixth Circuit. While it is true that the plaintiff, by being denied the injunction, is being turned out of this, the court of his residence, and will be forced to go almost 3000 miles to the District of Columbia to secure jurisdiction of the Postmaster General, which in normal times is no small inconvenience and expense, and in these times requires the foresight and planning almost of a major expedition, and while it is true that the Postmaster General can actually and in fact present any and all defenses to the courts of this district through the office of the United States Attorney as well and as easily as could be done in the District of Columbia, inasmuch as the power of any court in this kind of a case is limited to reviewing the naked record, so that driving the plaintiff out of these courts to the District of Columbia, where the Postmaster General lives, is paying obeisance to an outmoded, if not a ridiculous, fiction, I nevertheless feel bound to follow the Circuit Court of Appeals of this district as laid down in Nehr v. Harwood, with which con-

clusion, I might say, I do not agree, and must and do reluctantly hold that the Postmaster General is an indispensible party and will be compelled to so hold until the Ninth Circuit and the Sixth Circuit come into [290] harmony in their opinions, or the Supreme Court resolves the conflict between them.

The motion of the defendant to dismiss is granted, which being so it is unnecessary to pass on the motion for a preliminary injunction. [291]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 4th day of March, A. D. 1946.

AGNAR WAHLBERG
Official Reporter

[Endorsed]: Filed Mar. 11, 1946. [292]

In the District Court of the United States in and for the Southern District of California
Central Division

No. 5043-PH Civil

AL WILLIAMS and AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., a corporation,

Plaintiffs,

v.

MICHAEL J. FANNING, individually and as Postmaster of the City of Los Angeles, California,

Defendants.

ORDER OF DISMISSAL

The above matter having come on for hearing on February 11, 1946, before the Honorable Peirson M. Hall, Judge Presiding, Richard L. North appearing as attorney for plaintiffs, and Ronald Walker, Assistant United States Attorney, appearing as attorney for defendant, and the court having considered the motion of defendant to dismiss said action, and the court having heard oral argument for and against said motion, and the matter having been submitted, and the court having rendered its decision in open court on March 4, 1946, granting the motion of said defendant to dismiss said action on the ground that the Postmaster [293] General of the United States is an indispensable party thereto,

It Is Hereby Ordered and Adjudged that the said action be, and it hereby is, dismissed.

Dated: March 18th, 1946.

PEIRSON M. HALL
United States District Judge

Presented by:

RONALD WALKER
Assistant U. S. Attorney

Approved as to form as provided in Rule 7:

RICHARD L. NORTH
Attorney for Plaintiffs

Judgment entered Mar. 19, 1946. Docketed Mar. 19, 1946. C. O. Book 37, Page 360. Edmund L. Smith, Clerk, by J. M. Horn, Deputy.

[Endorsed]: Filed Mar. 19, 1946. [294]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above named plaintiffs, Al Williams and Al Williams Health System of Los Angeles, Inc., a corporation, do and each of them does hereby appeal to the Circuit Court of *Appeal* for the Ninth Circuit, from the Final Order of Dismissal entered in this action on the 19th day of March, 1946.

Dated: April 12, 1946.

RICHARD L. NORTH
Attorney for Plaintiffs

[Endorsed]: Filed & mld. copy to Chas. H. Carr, Atty. for deft. Apr. 12, 1946. [295]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 299 inclusive contain full, true and correct copies of Complaint; Notice of Motion to Dismiss; Minute Order Entered February 11, 1946; Amended Complaint; Reporter's Transcript of Proceedings held on March 4, 1946; Order of Dismissal; Notice of Appeal; Statement of Points to Be Relied on Upon Appeal and Designation of Contents of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $33.65 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 6 day of May, A. D. 1946.

(Seal) EDMUND L. SMITH
Clerk

By Theodore Hocke
Chief Deputy Clerk

[Endorsed]: No. 11317. In the United States Circuit Court of Appeals for the Ninth Circuit. Al Williams and Al Williams Health System of Los Angeles, Inc., a corporation, Appellants, vs. Michael J. Fanning, Individually and as Postmaster of the City of Los Angeles, California, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed May 7, 1946.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11317

AL WILLIAMS and AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., a corporation,

Appellants,

vs.

MICHAEL J. FANNING, Individually and as Postmaster of the City of Los Angeles, California,

Appellees.

STATEMENT OF THE POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL, AND DESIGNATION OF THE PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF.

(Rule 19, Paragraph 6)

The above named appellants, Al Williams and Al Williams Health System of Los Angeles, Inc., a corporation, having appealed to the Circuit Court of Appeals for the Ninth Circuit, do hereby present their statement of the points on which they intend to rely on the appeal, and designate the parts of the record which they think necessary for the consideration thereof, as follows:

Points on Which Appellants Intend to Rely on Appeal:

I.

The Postmaster General has no authority to issue a fraud order based solely upon opinion evidence and he

has no discretion when only opinion evidence is before him.

II.

The fraud order directed against appellant Al Williams is based upon opinion evidence alone; has no substantial evidence to support it; was issued without authority, and is therefore void.

III.

The Postmaster General is not an indispensable party to the action for an injunction when he exceeds his authority in issuing the fraud order or when there is no substantial evidence to support it.

IV.

Appellant Al Williams Health System of Los Angeles, Inc., is entitled to enjoin the local Postmaster alone, because the fraud order was not directed against it, nor was it accorded any hearing before the order was issued, but its mail is nevertheless being subjected to the order.

V.

The fraud order, being based upon opinion evidence alone, is without any substantial evidence to support it and the Postmaster General therefore acted without authority and he is not an indispensable party to the action

VI.

The local Postmaster alone may be enjoined from executing a fraud order issued by the Postmaster Gen-

eral in excess of his authority and the District Court erred in granting the motion to dismiss.

* * * * * * * * *

RICHARD L. NORTH
Attorney for Appellants.

Received copy of the within Statement of the Points on Which Appellants Intend to Rely on Appeal, and Designation of the Parts of the Record Necessary for the Consideration Thereof this 4th day of May, 1946. Ronald Walker, Asst. U. S. Attorney Attorney for Appellees.

[Endorsed]: Filed May 7, 1946. Paul P. O'Brien, Clerk.

No. 11317

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

AL WILLIAMS and AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., a corporation,

Appellants,

vs.

MICHAEL J. FANNING, Individually and as Postmaster of the City of Los Angeles, California,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of
Tuesday, December 3, 1946

Before: Garrecht, Denman and Healy, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Richard L. North, counsel for appellants, and by Mr. Clarke Stephens, Assistant United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of
Friday, December 6, 1946

Before: Garrecht, Denman and Healy, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11,317

Dec. 6, 1946

AL WILLIAMS and AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., a corporation,

Appellants,

vs.

MICHAEL J. FANNING, Individually and as Postmaster of the City of Los Angeles, California,

Appellee.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

OPINION

Before: Garrecht, Denman and Healy, Circuit Judges.

Per Curiam.

Upon the authority of Neher v. Harwood, 128 F. 2d 846, C.C.A. 9th, the judgment in this case is affirmed.

[Endorsed]: Per Curiam Opinion. Filed December 6, 1946. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,317

AL WILLIAMS, et al.,

Appellants,

vs.

MICHAEL J. FANNING, etc.,

Appellee.

DECREE

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed]: Filed and entered Dec. 6, 1946.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred eighty-seven (287) pages, numbered from and including 1 to and including 287, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 19th day of January, 1947.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 14, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to the first question presented by the petition for the writ and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1382)

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IN THE

Supreme Court of the United States

October Term, 1947

No. 1083 47

AL WILLIAMS and AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., a corporation,

Petitioners,

vs.

MICHAEL J. FANNING, individually and as Postmaster of the City of Los Angeles, California,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Ninth Circuit and Brief in Support Thereof.

IRVING M. WALKER,
440 Van Nuys Building, Los Angeles 14,
Attorney for Petitioners.

RICHARD L. NORTH,
1916 Ripple Street,
Los Angeles 26,
Of Counsel.

Parker & Company, Law Printers, Los Angeles Phone TR. 5206

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Point II. There are two reasons why the Postmaster General is not and should not be an indispensable party to this or any similar action under these statutes, *i. e.*, (1) he has no authority to issue a fraud order solely upon opinion evidence and he has no discretion when only opinion evidence is before him, and (2) the principles of equity and practical justice require that recourse from the ruinous effects of a fraud order shall be immediate in order to forestall the serious damage to reputation and property, until the case can be heard on the merits, and one should not be required to seek a distant forum where the presence of the Postmaster General would not be likely anyway 28

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IN THE

Supreme Court of the United States

October Term, 1947.

No. .....

AL WILLIAMS and AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., a corporation,

Petitioners,

vs.

MICHAEL J. FANNING, individually and as Postmaster of the City of Los Angeles, California,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Ninth Circuit.

To the Honorable, The Supreme Court of the United States:

The petitioners, Al Williams and Al Williams Health System of Los Angeles, Inc., a corporation, respectfully pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, entered December 6, 1946 [R. 287] (..... F. (2d) .....), affirming a judgment of dismissal of the District Court for the Southern District of California, Central Division [R. 271, 276].

Statement of the Matter Involved.

Petitioners filed suit in the District Court to enjoin respondent, who is the local Postmaster at Los Angeles, California, from enforcing a fraud order of the Postmaster General [R. 257] purporting to have been issued under the so-called Postal Fraud Order Statutes (U. S. C. A. Title 39; Secs. 259, 732, R. S. 3929, 4041; 28 Stat. 964, 26 Stat. 466). Petitioners sought injunctive relief upon the ground that the Postmaster General had exceeded his authority in issuing the fraud order [R. 259, 264] and, by leave of Court, filed their amended complaint [R. 230, 231] eliminating all constitutional questions.

Respondent moved to dismiss solely upon the ground that petitioners had failed to state a claim upon which relief could be granted [R. 229]. The District Court reluctantly granted the motion upon the ground that the Postmaster General is an indispensable party to the action [R. 276], basing the ruling upon the case of *Neher v. Harwood*, 128 F. (2d) 846, with which the Court stated it did not agree but felt bound to follow [R. 274, 275].

Petitioners rely not only upon the allegations of ultimate fact in their amended complaint [R. 231] which must here be assumed to be true, but also upon the complete transcript of evidence taken before the Postoffice Department [R. 44-218], and the Findings of Fact of the Postmaster General [R. 219] which are, respectively, "Exhibit A" and "Exhibit B" attached to the amended complaint, together with the fraud order in question which is therein set forth in full [R. 257]:

Basis of Jurisdiction of This Court.

(a) The jurisdiction of this Court is invoked under section 240 Judicial Code, 28 U. S. C. A., Sec. 347.

(b) Petitioners have eliminated all questions involving the constitutionality or validity of the Statutes involved [R. 230, 231], which are the so-called "Fraud Order Statutes" (39 U. S. C. A., Secs. 259, 732), the material portion of said section 259 reading as follows:

> "The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct Postmasters at any Post Office at which registered letters or any other letters or mail matter arrive directed to any such person or company * * * to return all such mail matter to the Postmaster at the office at which it was originally mailed with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such mail matter so returned to such Postmasters shall be by them returned to the writers thereof * * *."

Said section 732 contains the same material provisions but forbids the payment of any postal money order. Both sections are invoked by the fraud order in question.

(c) The judgment of the Circuit Court of Appeals was made and entered December 6, 1946. The petition was filed in this Court after January 6, 1947, and before March 6, 1947.

Questions Presented.

I. When the authority of the Postmaster General to issue a fraud order is the ultimate question raised by the complaint, is he an indispensable party to an action against the local Postmaster to enjoin the enforcement of the order?

II. Is not the question of the statutory power of the Postmaster General a question of law which may be determined in any appropriate forum without his personal presence particularly when the transcript of the entire proceedings in the Postoffice Department is before the Court?

III. Has Congress entrusted the administration of these statutes wholly to the discretion of the Postmaster General, and to such an extent that his determination is conclusive upon all questions arising under them?

IV. Has the Postmaster General the authority under these statutes to issue a fraud order based solely upon opinion evidence which is clearly insubstantial, or can his authority be questioned only upon constitutional grounds?

V. On the question of whether or not the Postmaster General is an indispensable party to an action to enjoin the local Postmaster from enforcing a postal fraud order, does a conflict exist between the cases of *Varney v. Warehime*, 147 F. (2d) 238; *Greer v. Cline*, 148 F. (2d) 380, and *Jarvis v. Shackleton Inhaler Co.*, 136 F. (2d) 116, all from the Sixth Circuit, and *Pinkus v. Walker*, 61 Fed. Supp. 610 (N. J.) on the one hand and this case before the Court and *Neher v. Harwood*, 128 F. (2d) 846, Ninth Circuit, on the other?

VI. Has the Postmaster General the authority under these statutes to ruin completely the reputation and long-established legitimate business of a reputable citizen and to publicly stamp him a fraud, without substantial evidence, and solely upon the mere expression of opinion of one medical witness who states that the true facts of the matter upon which he expresses the opinion can easily be determined by a simple experiment in any laboratory, which experiment was not performed by him or by anyone else?

VII. In an action against the local Postmaster to enjoin his enforcement of a fraud order so issued by the Postmaster General, and in which the complete record of the proceedings in the Postoffice Department is before the Court, do the principles of equity and practical justice require that the one against whom the order is directed must, to obtain relief, travel 3,000 miles to the forum of the residence of the Postmaster General, whose personal presence would not be likely anyway and who has the right of intervention and the facilities at his disposal for proper representation in any forum?

VIII. In similar cases arising under these statutes and in which the entire proceedings in the Postoffice Department are before the Court, is it a valid objection to an action to stop quickly the ruinous destruction of reputation and property attendant upon the enforcement of a fraud order, that the principal who is outside the Court's jurisdiction is the one to be bound, when he is perfectly at liberty to intervene if he wishes or to defend through the local Postmaster as his agent?

IX. Does the case of *Neher v. Harwood*, 128 F. (2d) 846, hold that the authority of the Postmaster General

under these fraud order statutes can only be questioned upon constitutional grounds and, if it does so hold, is it in conflict with *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, or *Jarvis v. Shackleton*, 136 F. (2d) 116, Sixth Cir., or *Pinkus v. Walker*, 61 Fed. Supp. 610 (N. J.)?

X. If the Postmaster General issues a fraud order upon insubstantial evidence or upon opinion evidence alone, is he an indispensable party to an action against the local Postmaster to enjoin the enforcement of the order, when the entire record of the proceedings in the Postoffice Department is before the Court?

XI. Did the Circuit Court err in affirming the judgment of the District Court in this case?

Reasons for Allowance of the Writ.

REASON I.

The ultimate question in the case before the Court is whether or not the Postmaster General is an indispensable party to the action. On this question the Circuit Court of Appeals of the Ninth Circuit has rendered a decision in this case and in the case of *Neher v. Harwood*, 128 F. (2d) 846, in conflict with the decisions of the Sixth Circuit Court of Appeals, in the cases of *Varney v. Warehime*, 147 F. (2d) 238, and *Jarvis v. Shackleton Inhaler Co.*, 136 F. (2d) 116, and with *Pinkus v. Walker*, 61 Fed. Supp. 610 (N. J.), the Sixth Circuit and the District Court in the Third Circuit holding that those who in good faith believe a public official is proceeding beyond his jurisdiction should be permitted to litigate the question if the officer before the court is such an agent in the matter involved that it is equitable and practical to proceed

to an adjudication of the issue with finality, and the Ninth Circuit holding, in effect, that the Postmaster General is an indispensable party to every action to enjoin the enforcement of his fraud order unless his authority is questioned on constitutional grounds.

REASON II.

That Congress never intended to place in the hands of the Postmaster General the authority or power to issue a fraud order with its attendant personal ruin of the one against whom it is directed, solely upon mere opinion evidence which varies greatly from time to time according to the many personal or group prejudices of those who express them; that such a power is abhorrent to our traditions, and the Postmaster General *is without authority* to issue a fraud order upon insubstantial or opinion evidence alone, and he is not an indispensable party to an action to enjoin its enforcement if he does so and, for that reason, the Circuit Court of Appeals for the Ninth Circuit has, in this case and in the case of *Neher v. Harwood, supra*, rendered a decision upon an important question of General Law probably untenable and in conflict with the weight of authority and in conflict with *Jarvis v. Shackleton, supra*, and *Varney v. Warehime, supra*, both from the Sixth Circuit.

REASON III.

That the decisions of the Circuit Court of Appeals of the Ninth Circuit in the case of *Neher v. Harwood, supra*, and in affirming the decision of the District Court in this case upon the authority of *Neher v. Harwood*, are decisions of an important question of General Law probably untenable and in conflict with the weight of authority expressed

in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, and the long line of approving cases culminating in *Estep v. United States* (1946), 90 U. S. Supreme Court, L. Ed., Advance Opinion 405, and are decisions of an important question of General Law probably untenable and in conflict with the weight of authority expressed in *Varney v. Warehime*, 147 F. (2d) 238, and *Jarvis v. Shackleton*, 136 F. (2d) 116, in that the said decisions of the Ninth Circuit hold, in effect, that the Postmaster General is an indispensable party to all actions to enjoin the enforcement of a postal fraud order unless his authority is questioned upon constitutional grounds.

REASON IV.

That the decisions of the Circuit Court of Appeals of the Ninth Circuit in the case of *Neher v. Harwood, supra*, and in affirming the decision of the District Court in this case upon the authority of *Neher v. Harwood*, are decisions of an important question of Federal Law not previously settled, *i. e.*, is the Postmaster General an indispensable party to an action against the local Postmaster to enjoin the enforcement of a postal fraud order, and if so, under what circumstances? (See *Brooks v. Dewar*, 313 U. S. 354, 359.)

REASON V.

That the question of whether or not the Postmaster General is an indispensable party to an action to enjoin the enforcement of his fraud order by the local Postmaster when the order is not supported by substantial evidence but is supported only by mere opinion evidence, is one upon which the Circuit Courts are in admitted disagreement and the question is of such wide importance and

public interest and concern that it should be definitely decided by this Court.

REASON VI.

That the Circuit Court of Appeals for the Ninth Circuit has decided a Federal question in a manner probably in conflict with applicable decisions of this Court, in disregarding and refusing to follow the rule clearly pronounced in the case of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, that these fraud order statutes were intended to cover only cases of actual fraud in fact, in regard to which opinion formed no basis, and that *the Postmaster General has no authority* to issue a fraud order unless the question is one of fact, as distinguished from mere opinion.

For these reasons, it is respectfully submitted that this petition should be granted.

AL WILLIAMS,
AL WILLIAMS HEALTH SYSTEM
OF LOS ANGELES, INC.,
Petitioners.

We hereby certify that the foregoing petition is well founded and not interposed for delay.

IRVING M. WALKER,
Attorney for Petitioners.

RICHARD L. NORTH,
Of Counsel.

State of California, County of Los Angeles—ss.

Al Williams, being first duly sworn, deposes and says: That he is one of the petitioners named in the foregoing Petition in the above entitled action; that he has read said Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to such matters that he believes it to be true.

AL WILLIAMS.

Subscribed and sworn to before me this 24th day of February, 1947.

(Seal) MARVA WEEDE,

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires February 3, 1950.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

AL WILLIAMS and AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, a corporation,

Petitioners,

vs.

MICHAEL J. FANNING, individually and as Postmaster of the City of Los Angeles, California,

Respondents

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

I. The opinion of the District Court was filed by Judge Peirson M. Hall, March 11, 1946 [R. 275], and judgment was entered March 19, 1946 [R. 277]. Said opinion appears in the Appendix to this brief.

II. The *per curiam* opinion of the Circuit Court of Appeals was filed and entered December 6, 1946 [R. 286-287] but does not appear in the Federal Reporter.

III. No petition for rehearing was filed.

Jurisdiction.

The jurisdiction of this Court is invoked under the provisions of Section 240, Judicial Code, 28 U. S. C. A., Sec. 347, which reads as follows:

> "(a) In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

As established by the amended Complaint [R. 231], the action is one arising under the postal laws. Jurisdiction in the District Court was therefore under 28 U. S. C. A., Sec. 41 (6). Jurisdiction in the Circuit Court of Appeals was under the provisions of 28 U. S. C. A., Sec. 225(a) and (d).

This is a petition for certiorari to the Circuit Court of Appeals of the Ninth Circuit in a case involving the question as to whether or not the Postmaster General is an indispensable party to an action against the local postmaster to enjoin the enforcement of a postal fraud order.

The jurisdiction of this Court is invoked upon the following grounds:

1. That there is a conflict between Circuit Courts of Appeals as to whether or not the Postmaster General is an

indispensable party to an action against the local postmaster to enjoin his enforcement of a postal fraud order.

2. That the Circuit Court of Appeals of the Ninth Circuit has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

3. That the said Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court.

4. That the said Circuit Court has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

Statement of Facts.

Petitioner Al Williams is a citizen and taxpayer of the City of Los Angeles and has, for more than 20 years, been engaged in the business of reducing and conditioning business and professional men in California.

In 1916 he was athletic instructor at the Olympic Club in San Francisco and, during the First World War, originated a system of rifle disarming for defense purposes and was sent by the Government to teach at Fort Sill, Oklahoma; Camp Borden, Georgia, and to the Presidio at San Francisco, from which he returned to the Olympic Club at the close of the war.

In 1935 he became interested in concentrated nutrition and devised a system designed to eliminate hunger and the desire to overeat, and he has since experimented with concentrated foods and their effect upon the human body. He has revised the eating schedules of at least 50,000 individuals and has thus gained practical knowledge and experi-

ence concerning certain concentrated food tablets which are a part of his reducing program. For more than 10 years he has engaged in reducing those who are overweight, by means of a program which consists of prescribed diets, exercise and the taking of concentrated food tablets with fruit juice, milk, soup or water. These tablets are composed only of vegetable concentrates and are designed to take away hunger and the desire to overeat. Said reducing program also includes the use of a body Massage Creme to tighten the skin and help correct flabby fat tissue caused by the loss of weight. A substantial part of said business has been conducted through the United States mails over the entire period, without complaint by any user of said tablets or creme, and petitioner Al Williams has enjoyed a reputation for honesty and integrity of a high order wherever his name is known. [R. 233-235.]

Petitioner Al Williams Health System of Los Angeles, Inc., is a corporation which has never been an officer or agent of or for petitioner Al Williams or any of the other four fictitious designations named in the fraud order of the Postmaster General; that said fraud order is not directed against said corporation [R. 257-258], nor is it named therein nor was it ever given notice of any hearing before the Postoffice Department, and did not file an answer or appear at any hearing, but the mail of said corporation nevertheless has been and is being returned by the respondent to the senders thereof, marked "Fraudu-

lent", pursuant to said fraud order. [R. 257-258, 266-268.]

On or about May 28, 1945, petitioner Al Williams received a Specification of Charges from the Postoffice Department and a notification that such charges would be taken up for disposition at a hearing to be held in Washington, D. C., on the 20th day of June, 1945, at 10:00 A. M.

Said petitioner appeared at the hearing and filed an answer to the charges [R. 52-56], and a hearing was had and testimony presented, of which a complete transcript is attached to the Amended Complaint as "Exhibit A." [R. 57-218.]

At the said hearing before the Postoffice Department, much to the surprise of petitioner, the prosecution presented and relied solely upon the opinion evidence of one doctor, to establish fraud [R. 103-156].

The petitioner presented at said hearing no evidence but his own [R. 156-216], although he offered in evidence testimonials in the form of about 2,000 unsolicited letters of commendation which were refused [R. 168-171] and he was denied the right to testify to the results of his years of experience in the use upon himself and others, of the tablets and creme, and their ability to actually perform and fulfill the claims which he made for them, and which form the basis of the charges [R. 161-168], upon the ground that he was not a medical expert.

After the hearing before the Postoffice Department, petitioner Al Williams realizing that he was to be judged by the opinion testimony of one doctor and that his good reputation and extensive business which he had established over a long period of years might be utterly destroyed, filed a motion with the Department to reopen the case for the purpose of taking the depositions of medical experts living in Los Angeles, who are familiar with his reducing program, and, supporting the motion were filed the affidavits of two such Doctors of Medicine, but said motion was denied [R. 260-264].

Then, having in mind the testimony of that doctor [R. 153-154] that the important question of whether or not the tablets took hunger away could easily be established as a fact in any laboratory by the use of a kymograph, and having learned that a kymograph was available for such tests at the laboratory of the University of Southern California, said petitioner filed a motion with the Postoffice Department to reopen the case in order to receive in evidence the results of such tests to be made at appellant's expense, and said motion was also denied [R. 228].

On December 10, 1945, the Postmaster General issued what is known as a "fraud order" against petitioner Al Williams and five others fictitiously named therein [R. 257-258] and on January 7, 1946, petitioners filed their complaint herein against the Postmaster at Los Angeles, to enjoin him from enforcing said fraud order upon the ground that the Postmaster General exceeded his author-

ity, and on February 1, 1946, the defendant filed his motion to dismiss upon the ground that plaintiffs had failed to state a claim upon which relief can be granted [R. 229].

At the hearing upon said motion and by leave of court [R. 230], an amended complaint [R. 231-270] was filed, eliminating all reference to the constitutionality of the statute, to which amended complaint was attached by reference "Exhibit A" and "Exhibit B" attached to the original complaint [R. 44-228], being a complete transcript of the proceedings before the Postoffice Department and the Memorandum or Finding of Fact recommending the issuance of a fraud order, respectively, and the motion to dismiss was deemed to be lodged against the Complaint as Amended.

On March 4, 1946, the District Court reluctantly granted the defendants' motion to dismiss upon the ground that the Postmaster General is an indispensable party on the authority of *Neher v. Harwood*, 128 F. (2d) 846, with which the Court stated it did not agree but felt bound to follow [R. 271-275]. The opinion appears in full in the Appendix to this brief.

On December 6, 1946, the Circuit Court of Appeals of the Ninth Circuit affirmed the judgment of the District Court in an opinion *per curiam*, upon the authority of *Neher v. Harwood, supra* [R. 286].

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In affirming the judgment of the District Court holding that the Postmaster General is an indispensable party.

(2) In affirming the judgment upon the authority of the case of *Neher v. Harwood, supra,* which case sustains the position of petitioners that the Postmaster General is not an indispensable party when his authority is questioned.

(3) In failing to observe and find that the statutory authority of the Postmaster General was expressly questioned by the complaint [R. 259, 264-265] and that he is not, for that reason alone, if for no other, an indispensable party to the action, since the question of his statutory power is one of law to be determined in any appropriate forum without his presence being necessary.

(4) In failing to follow the clear and unambiguous ruling of this Court in the case of *American School of Magnetic Healing v. McAnnulty,* 187 U. S. 94, that "these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis."

(5) In disregarding the principle that, "Equity delights to do complete justice and not by halves," and in adhering to a formal and inapplicable rule of equity pleading, resulting in a conflict with the Circuit Court of Appeals of the Sixth Circuit and with applicable decisions of this Court.

ARGUMENT.

POINT I.

The Evidence of Fraud Presented Before the Postmaster General and Upon Which the Fraud Order Is Based Consisted Only of the Mere Expressions of Opinion of One Witness and Was Clearly Insubstantial.

Since the sole question here is whether or not the Postmaster General is an indispensable party, it is perhaps sufficient that the amended complaint expressly questions the statutory authority of the Postmaster General to issue the fraud order [R. 259, 264-265], for it is well settled that he is not an indispensable party when the question raised is his authority to act at all. (*Varney v. Warehime*, 147 F. (2d) 238, 242, *certiorari* denied, and cases there cited, including *Neher v. Harwood*, 128 F. (2d) 846.)

On the other hand, it may be of some interest and perhaps assistance to the Court to consider the evidence before the Postmaster General upon which the fraud order is based, since the authority of the Postmaster General to act depends upon whether or not he has before him evidence of fraud in fact or mere opinion evidence, for he has no discretion in the presence of opinion evidence alone.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94; and more than one hundred cases in which it is cited and approved;

Jarvis v. Shackleton Inhaler Co., 136 F. (2d) 116, (6th Cir. 1943);

Pinkus v. Walker, 61 Fed. Supp. 610 (N. J. 1945).

The appellee before the Circuit Court of Appeals refused to concede that the fraud order here in question is based solely upon opinion evidence, although the District Court, in its opinion, stated that "In the instant case, except for the evidence of mailing and a chemical analysis of some food tablets—and the chemical analysis bore out the plaintiff's representations—there was no evidence at all before the Postmaster General except the testimony of an employee of the Food and Drug Administration of the Government, who testified as a medical expert as to the efficacy, in his opinion, of plaintiff's plan of reducing obesity." [R. 272-273.]

The testimony before the Post Office Department appears on pages 44 to 218, inclusive, of the Transcript of Record.

There were four witnesses for the Department and one for the respondent.

(a) The first witness was a Post Office Inspector who established certain test correspondence which brought to the Post Office Department literature containing representations [R. 57-90] admittedly made by petitioner, Al Williams, but which differ in several material respects from the charges. [Para. XV, Amended Complaint, R. 238.]

(b) The second witness was a chemist from the Food and Drug Administration who gave the weight and chemical analysis of the tablets and massage creme, revealing that the tablets weighed 12.65 grains each and consisted of 1.14 grains sodium and potassium oxides; kelp 30.38 grains; .10 grains iron and .35 grains calcium oxide, with a trace of iodine, and that the massage creme contained .12% phenol; .25% volatile oils and 75.5% water incorporated in a greaseless base. [R. 91-94.]

(c) The third witness was a microanalyst from the Food and Drug Administration, who testified that he had made a microscopic analysis of the tablets revealing that they contained 17 vegetable concentrates only. [R. 94-102.]

(d) The final and key witness for the Postoffice Department was a Doctor of Medicine from the Food and Drug Administration, who testified that he received the degree of M.D. at Harvard University Medical School in 1934 and from 1934 to 1938 was interne in several hospitals in Boston, Massachusetts, and from 1938 to 1939 he was on active duty with the United States Army, assigned to the Civilian Conservation Corps, and from 1939 to 1941 he was a medical officer for the Veterans' Administration, Washington, D. C., and that since 1941 he had been with the Food and Drug Administration, where his duties include the examination of labels to determine whether or not they comply with the Food, Drugs and Cosmetics Act; that his experience as a practicing physician was as follows: He was licensed in 1936 to practice medicine in the State of Maine and in Massachusetts, and in 1942 was licensed to practice in the District of Columbia, where he had since practiced; that he is and since 1941 has been a clinical instructor in medicine at the George Washington University School of Medicine, Washington, D. C.; that he is on the Dispensary Staff of Emergency Hospital in Washington, as well as an associate visiting physician at Gallinger Hospital in Washington, and that he has been an associate of the American College of Physicians since 1942; that he did not practice in Maine but did practice for short spaces of time in Massachusetts in between appointments at hospitals, but nothing very extensive; that

he never practiced over a three-month period at any one time; that since 1942 his practice has been limited to internal medicine and that his present private practice is limited to evening hours and week-ends, including Sundays, which does not relate to any of his official duties with the Food and Drug Administration. [R. 103-106.]

The testimony of this witness was the sole basis offered by the Post Office Department to support the charges of "false and fraudulent pretenses, representations and promises." These charges appear in the Transcript of Record on pages 45 to 46 and an additional charge was added by letter addressed to petitioner Williams at Los Angeles and mailed at Washington, D. C., two days before the hearing date. [R. 47.]

The representations and promises supplied by the testimony of the Postal Inspector [R. 59-90] are all admitted but differ materially from the charges in several respects. [Para. XV, Amended Complaint, R. 238-239.]

That the testimony of this key witness for the Post Office Department amounts only to expressions of opinion as distinguished from factual evidence and is insubstantial in character and that the complaint giving rise to the proceedings culminating in the fraud order, came from sources other than users of petitioner's reducing program, are conclusions reasonably to be drawn from a study of the testimony of the witness found on pages 103 to 217, inclusive, of the Transcript of Record.

The unstable and theoretical character of the testimony of this witness is apparent from the portions thereof which follow and which are ample reasons for the proposition that the ruinous and devastating results of a fraud order were never intended to depend to any extent upon

opinion evidence or upon anything less than substantial evidence having a basis of fact rather than theory.

The testimony appearing in the Transcript of Record, pages 108-115, inclusive, clearly indicates the fact that the accused were being judged entirely by mere opinions and, indeed, by the standards and opinions of the witness who makes the principal claim that the information or case history sought by petitioner Al Williams, who has had 25 years of actual and successful experience in weight reduction, was inadequate to determine whether or not it was safe for the person to reduce. A comparison of the information or case history required by petitioner and that which the witness claimed is necessary, appears on page 244 of the Transcript of Record.

That the testimony of this key witness is too unstable to constitute substantial evidence appears from the following comparison of his statements, viz.:

> "Q. Would the taking of these so-called food tablets take that hunger away? A. It would not." [R. 126.]
>
> "Q. You have indicated that there is a possibility or I believe you have, that if one takes these tablets with fruit juice or buttermilk or the others the hunger pains might disappear? A. Yes, they may." [R. 154-155.]

The method of taking the tablets required by the reducing program was "with ½ glass of fruit juice, skim milk, hot broth or water." [R. 81-82.]

It is quite apparent that, for whatever reason, the main contention of the witness and the Post Office Department

is that no attempt should be made to accomplish weight reduction, except under the supervision of a Doctor of Medicine, viz.:

> "Mr. Mindel: They don't say go to your doctor and see whether or not the system is going to hurt you or help you." [R. 111.]

Also:

> "Q. Now as I understand your testimony you believe that anybody who may be obese should first consult a physician if he desires treatment. Is that your position? A. I think that is the sensible thing to do.
>
> Q. Well, you say sensible thing, you think that should be done, don't you? A. I certainly think we should be sensible." [R. 144.]

That all of the testimony from this witness was purely opinion evidence as distinguished from factual evidence, appears not only from the very nature of his statements, but from his own admission also, viz.:

> "Q. Doctor, does the testimony you have given here today represent the consensus of modern medical opinion? A. It does." [R. 135.]

But other Doctors of Medicine do not agree with the statements of the witness to the effect that the cessation of hunger pains is directly proportionate to the number of calories put into the stomach or that the food tablets or creme would not perform the functions claimed. When it appeared that the Post Office Department was depending upon opinion evidence, petitioner Al Williams asked that the case be reopened for the purpose of taking the depositions in Los Angeles, of Doctors of Medicine familiar with said reducing program, and who could not at-

tend at Washington by reason of restricted travel accommodations and demands upon their professional time, and the affidavits of two such doctors supported the motion, which was denied. [R. 261-264.]

Finally this witness states that the main question at issue could be easily determined as a fact by the use of a kymograph in any laboratory, viz.:

> "The Witness: I would say that testimonial had no value. An individual who takes two tablets with a glass of buttermilk or skim milk and then has disappearance of hunger pains does not know whether the hunger pains disappeared due to the effect of the tablets or to the effect of the juice or milk or soup that went with it, or to both. He doesn't know anything. All he knows is that the hunger pains went away if they did. To determine whether or not the hunger pains were eliminated, if they were, by the tablets, one would have to set up a control experiment and a scientifically controlled experiment can be done in any laboratory by the use of a kymograph that I mentioned and the balloon in the stomach and so on. One could really find out the effect of the various things that are put into the stomach on hunger contraction that way." [R. 153-154.]

It can be fairly assumed that the Food and Drug Administration, by whom the witness was employed, has a laboratory, but apparently no scientific tests were made to determine the fact, so petitioner Williams offered to pay for the making of such tests at the University of Southern California, and moved to reopen the case for that purpose, but the motion was again denied. [Findings of the Post Office Department, R. 228.]

Appellant was denied the right to testify before the Post Office Department concerning the results of his long experience with the preparations used in connection with the reducing program.

The Findings of the Post Office Department further state that appellant Al Williams, who had spent 25 years studying and practicing weight reduction and 10 years using concentrated foods in connection with his reducing program and particularly the tablets in question, was not permitted to testify "because he was not qualified to give expert medical testimony" [R. 227, 156-216], and then the case seems to have been decided upon the ground that petitioner "offered no expert medical testimony." [R. 227.]

In *U. S. Smelting Co. v. Parry*, 166 Fed. 407, it was stated by Judge, later Justice Van De Vanter, that the rule which prohibits a non-expert witness from testifying as to his opinion or conclusion never was intended to to close any reasonable avenue to the truth in the investigation of questions of fact and that the most important qualification of the general rule is the one which permits a witness possessed of special training or experience to testify to his opinion.

The petitioner Williams and his attorney were entirely unable to produce medical testimony at the hearing before the Post Office Department. They were 3000 miles from home and unacquainted in Washington, D. C., and there were no medical men there known to them who were acquainted with the tablets or creme and their time was limited. They were at the beginning, ignorant of the fact that the Post Office Department would base the entire charge on the opinion evidence of a medical practi-

tioner and exclude the testimony of petitioner Al Williams, who used the tablets himself and observed the workings of the plan on many thousands of users over a long period of years.

Petitioner did the only thing open to him in order to save his business and reputation from complete ruin. He made an effort to reopen the case in order to take the depositions of medical men familiar with his program and to secure scientific tests.

Finally, much of the testimony of the key witness for the Post Office Department deals with expressions of his opinion as to whether or not the reducing program was "strict," "easy" or "safe" [R. 112-117, incl.] as claimed. In the case of *Carlay Co. v. Federal Trade Commission*, 153 F. (2d) 493, 496, petitioners represented that excessive weight could easily be removed from the human body by using certain candy before eating. The Court, in determining whether or not there was substantial evidence, said:

> "The Commission says that carrying the plan into execution is not 'easy.' The term obviously is one of comparative or relative connotation . . . This, comparatively speaking when one thinks of reduction of obesity, anyone must declare comparatively simple, comparatively easy. Consequently there is nothing deceptive in the advertising in this respect. What was said was clearly justifiable under the circumstances, under those cases recognizing that such words as 'easy,' 'perfect,' 'amazing,' 'prime,' 'wonderful,' 'excellent' are regarded in law as mere puffing or dealer's talk upon which no charge of misrepresentation can be based." (Citing cases.)

The decision also deals with the matter of substantial evidence and states that "substantial evidence is more than a mere scintilla."

Petitioners submit that there was no substantial evidence before the Postmaster General and no evidence of actual fraud in fact but that mere opinion formed the sole basis of the fraud order.

POINT II.

There Are Two Reasons Why the Postmaster General Is Not and Should Not Be an Indispensable Party to This or Any Similar Action Under These Statutes, i. e., (1) He Has No Authority to Issue a Fraud Order Solely Upon Opinion Evidence and He Has No Discretion When Only Opinion Evidence Is Before Him, and (2) the Principles of Equity and Practical Justice Require That Recourse From the Ruinous Effects of a Fraud Order Shall Be Immediate in Order to Forestall the Serious Damage to Reputation and Property, Until the Case Can Be Heard on the Merits, and One Should Not Be Required to Seek a Distant Forum Where the Presence of the Postmaster General Would Not Be Likely Anyway.

(1) The legitimate reducing business of petitioner Al Williams has been completely destroyed and his good reputation as well as that of petitioner Al Williams Health System of Los Angeles, Inc., and its successful and extensive conditioning business, have been irreparably injured by the mistaken, unauthorized and unwarranted act of the Postmaster General. To safeguard and preserve our individual rights and liberties is the function

of the judiciary, as stated by the Supreme Court in *Stark v. Wickard*, 321 U. S. 288, 309, as follows:

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect judiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."

This power was exercised by the Supreme Court of the United States in the case of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, which has since been cited with approval more than one hundred times and as late as February 4, 1946, in the case of *Estep v. United States*, 90 Sup. Ct. Law Ed., 405, 408.

Complainants in the *McAnnulty* case had founded a business upon the proposition that the mind of the human race is largely responsible for its ills and taught and practiced healing through exercise of the faculty of the brain and mind. The Court said:

> "Can such a business be properly pronounced a fraud within the statutes of the United States? . . .
>
> "Because the complainants might or did claim to be able to effect cures by reason of working upon and affecting the mental powers of the individual, and directing them toward the accomplishment of a cure of the disease under which he might be suffering,

who can say that it is a fraud or a false pretense or promise within the meaning of the statutes?

"How can anyone lay down the limit and say beyond that there are fraud and false pretenses? The claim of the ability to cure may be vastly greater than most men would be ready to admit, and yet those who might deny the existence or virtue of the remedy would only differ in opinion from those who assert it. There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity. We may not believe in the efficacy of the treatment to the extent claimed by complainants and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court . . .

". . . As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud.

"Unless the question may be reduced to one of fact as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of

stopping the delivery of mail matter. Other instances might be adduced to illustrate the proposition that these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis.

"It may perhaps be urged that the instances above cited by way of illustration, do not fairly represent the case now before us but the difference is one of degree only. It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a larger experience in some cases than in others, yet after all it is in each case opinion only, and not existing facts with which these cases deal. There are, as the bill herein shows, many believers in the truth of the claims set forth by complainants, and it is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and practice upon that basis obtain their money by false pretenses within the meaning of these statutes. The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved as a matter of fact that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood, and, as in our opinion, it is used in these statutes . . .

" . . . Has Congress entrusted the administration of these statutes wholly to the discretion of the Postmaster General, and to such an extent that his determination is conclusive upon all questions arising under those statutes, even though the evidence which is adduced before him is wholly uncontradicted, and shows beyond any room for dispute or doubt that the case in any view is beyond the statutes, and not covered or provided for by them?

"That the conduct of the Post Office is a part of the administrative department of the Government is entirely true, but that does not necessarily and always oust the Courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statutes under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the Courts generally have jurisdiction to grant relief . . .

". . . The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the Courts therefore, must have power in a proper proceeding to grant relief. Otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld."

The clear reasoning of this decision has never been questioned and the principles expressed have been recognized and followed by the courts in their struggle against technical rules which impede rather than contribute to substantial justice.

In *U. S. v. Johnson*, 221 U. S. 488 at 498, in determining what amounts to misbranding under the Food and Drug Act, the Court said:

> "We shall say nothing as to the limits of constitutional power, and but a word as to what Congress was likely to attempt. It was much more likely to regulate commerce in food and drugs with reference to plain matters of fact, so that food and drugs should be what they profess to be, when the kind was stated, than to distort the uses of its constitutional power to establish criteria in regions where opinions are far apart. See School of Magnetic Healing v. McAnnulty, 187 U. S. 94."

At a very early date this Court established the importance of the preservation of individual rights, in the case of *Ex Parte Jackson*, 96 U. S. 727, 732, as follows:

> "The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. *The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.*" (Emphasis added.)

Finally, in *Esquire v. Walker*, 151 F. (2d) 49, 54, in which the second-class mailing privilege was withheld by the Postmaster General, the Circuit Court said:

> "In this situation, assuming the existence of the power to censor, may a court review the issue of dominant vulgarity on its merits?

"The answer of the Government is an unqualified NO. It contends with some reason that this Court has no right to review the Postmaster General's notions of dominant vulgarity if they are supported by substantial evidence. It argues even more persuasively that no right minded man can brush aside as insubstantial the opinions of five clergymen (among whom is a bishop) on what is good for the public.

"We think the Government is clearly right in its contention once the power claimed by the Post Office is assumed to exist. There is a practical reason, apart from respect for the testimony of clergymen, why the administrative imposition of literary and artistic standards cannot be reviewed by a Court on its merits. Opinions on such matters differ so widely that if the evidence in the record before the Post Office were to be weighed each side would have to continue calling witnesses indefinitely in order not to be outweighed by the other. We have no doubt that thousands of reputable experts on the public good could have been obtained by each side in this case.

"We know of no way a Court can evaluate the comparative expert qualifications of persons who hold opinions on what the public should read. Once we admit the power claimed here we see no room for effective judicial review of its exercise. And so in practical effect it amounts to a power in the Postmaster General to impose the standards of any reputable minority group on the whole nation . . .

"We intend no criticism of counsel for the Post Office. They were faced with an impossible task. They undertook it with sincerity, but their very sincerity makes the record useful as a memorial to commemorate the utter confusion and lack of in-

telligible standards which can never be escaped when that task is attempted.

"We believe that the Post Office officials should experience a feeling of relief if they are limited to the more prosaic function of seeing to it that 'neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds."

This decision was affirmed in *Hannegan v. Esquire*, 90 Sup. Ct., Law Ed., 429, 433, February 4, 1946, this Court saying:

"And the Court held in Ex Parte Jackson, 96 U. S. 727, that Congress could constitutionally make it a crime to send fraudulent or obscene matter through the mails. But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever . . .

"It is plain, as we have said, that the favorable second-class rates were granted periodicals meeting the requirements of the Fourth condition, so that the public good might be served through a dissemination of the class of periodicals described. But that is a far cry from assuming that Congress had any idea that each applicant for the second-class rate must convince the Postmaster General that his publication positively contributes to the public good or public welfare. Under our system of government there is an accommodation for the widest varieties of tastes and ideas.

"What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' Don

Quixote, Shakespeare's Venus & Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system . . .

"To uphold the order of revocation would therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred."

(2) *The principles of equity and practical justice require that recourse from the ruinous effects of a fraud order shall be immediate in order to forestall serious damage to reputation and property, until the case can be heard on its merits.*

A full and comprehensive presentation of this phase of the question will be found in the Annotation to *Neher v. Harwood*, 158 A. L. R. 1126, 1139-1146.

As therein expressed, the issuance of a fraud order by the Postmaster General at Washington is something more than a mere decision regarding one's right to postal service, like a decision as to the rates to which he is entitled for a publication. It is something more even than a stoppage of the mail addressed to him, whether or not that mail be his property in the hands of a carrier. *It directs a deliberate and ruinous destruction of his reputation and good will.* These are recognized by the law as in the nature of property rights.

This being the case, the willingness of some courts to permit immediate procedure against the local postmaster appears commendable as a matter of practical justice. And as to legal theory, it is this postmaster who is threatening or actually inflicting the harm. It is for him to show his official warrant permitting him to do so.

The case does not necessarily fall within the rule against collateral attack on the judgment. His superior, the Postmaster General, has not rendered even a quasi-judicial judgment. The plaintiff has had a hearing but not one subject to direct appeal or even to *certiorari*. The very ground upon which the statute is held to be constitutional is that his decision may be reviewed collaterally by a Court. *Public Clearing House v. Coyne* (1904), 194 U. S. 497.

It is said that the Postmaster General should be made a party because "his are the hands that are being tied" and he is "entitled to be heard in defense of his actions"; but, on the other hand, that official is perfectly at liberty to defend through the local postmaster as his agent. It is never an objection to an injunction against the acts of an agent within the Court's jurisdiction, that his principal, without that jurisdiction, is the one to be bound, or is entitled to be heard. As to the official convenience requiring the hearing to be at Washington, it is to be observed that the records of the Department may be all that are required from that end. The personal presence of the Postmaster General would not be likely even in Washington. Unless the injured party can get a preliminary injunction or restraining order speedily, the harm may be done before he can even proceed to a hearing there. Indeed, in most if not all such cases, the transcript of the entire proceedings before the Post Office Department, is, of necessity, before the Court.

The case of *Varney v. Warehime*, 147 F. (2d) 238, 6th Circuit (*Certiorari* denied), was an action by a milk producer against a Milk Market Agent to enjoin the operation of certain provisions of an order of the

War Food Administrator. Upon the question as to whether the War Food Administrator was an indispensable party, the Court said:

"The decisions on this question are conflicting and the position of the Courts is therefore uncertain. Under these conditions it is our duty to follow the decisions which we conceive to be based on the sounder reasoning. Matters of convenience and necessity are entitled to consideration. Citizens should not be compelled to seek a distant forum for litigation of their controversies with the government, and likewise, public officials should not be compelled to neglect their duties to answer charges of usurpation of power in a distant forum.

"(1) Approaching the subject from a practical standpoint, we need not overlook the fact that the question of constitutional or statutory power of a public official is usually a question of law, and may be determined in any appropriate forum without the personal presence of the superior government official.

"(2, 3) The right of intervention is available to a superior official in any suit where his subordinate is made a party defendant. Governmental regulations under present circumstances are so widespread and affect such a vast number of our people that those who in good faith believe a public official is proceeding beyond his jurisdiction should be permitted to litigate the question if the officer before the court is such an agent in the matter involved that it is reasonable to proceed to an adjudication of the issue with finality. We adhere to the rule that where

the plaintiffs in an action are not seeking to prevent subordinates from executing a discretionary order of their superior but are challenging the power of the superior to make the regulation, it is not necessary to have the superior officer before the court. American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 S. Ct. 33, 47 L. Ed. 90; Public Clearing House v. Coyne, 194 U. S. 497, 24 St. Ct. 789, 48 L. Ed. 1092; Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143; State of Missouri v. Holland, 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984; State of Colorado v. Toll, 268 U. S. 228, 230, 45 S. Ct. 505, 69 L. Ed. 927; Brooks v. Dewar, 313 U. S. 354, 360, 61 S. Ct. 979, 85 L. Ed. 1399; Neher v. Harwood, 9 Cir., 128 F. 2d 846; Jarvis v. Shackleton Inhaler Co., 6 Cir., 136 F. 2d 116."

A similar case and ruling is found in *Greer v. Cline*, 148 F. (2d) 380, Sixth Circuit (1945).

In the case of *Jarvis v. Shackleton Inhaler Co.*, 136 F. (2d) 116, Sixth Circuit, appellee was in the business of manufacturing and marketing an inhaling compound and a device for its use and represented that it would prevent colds, inhibit the development of germs and prevent such organisms from spreading, and is "a proper and effective substitute for change of climate when such change is essential in cases of respiratory disorders," and other representations. The Court said:

(3) "The power of a Court of equity to review the order is limited. It extends no further than to

determine whether there is substantial evidence in fact, as distinguished from opinion, to support the order. If there is, the case is foreclosed against appellee. If there is not, it follows that appellee has suffered irreparable injury to its property rights. American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 S. Ct. 33, 47 L. Ed. 90; see, also, Public Clearing House v. Coyne, 194 U. S. 497, 24 S. Ct. 789, 48 L. Ed. 1092."

The evidence before the Post Office Department in that case consisted of pamphlets including excerpts from testimonial letters; analysis of the compound and the opinion of a doctor who stated that the substances in the preparation were well known; that they did not appear in the preparation in sufficient volume to have any germicidal effect and that the results claimed in the testimonials could not be attributed to the preparation because so many other factors entered into the case.

The Court held that there was no substantial evidence of fraud and that the fraud order was void, and further concluded that the principal question involved was whether the Postmaster General was an indispensable party to the suit. After quoting the various decisions reflecting the status of the question, the Court said:

(6) "The task of harmonizing these decisions is almost, if not altogether, impossible, and following the lead of Brooks v. Dewar, *supra*, we are reluctant to undertake it. We are content to decide the question on the record before us. We have already stated

the general rule. The rule grew out of the age-old maxim of equity jurisdiction, *i.e.*, 'Equity delights to do complete justice and not by halves.' The maxim sprang in turn from the desire of the early chancery courts to determine all matters involved in the litigation so that no roots of controversy would remain out of which other suits might spring. To accomplish this purpose, the courts required that all persons interested in the subject matter of the suit should be made parties so that its decree would bind them all. But courts of equity observe general rules only to the extent to which they contribute to the attainment of justice. They do not adhere to any rule which would defeat justice and thus destroy the very purpose for which they were created. Pomeroy's Eq. Jurispr., 4th Ed., Vol. 1, Sec. 60; Story's Eq. Pl., 8th Ed., Sec. 135a; Birdsong v. Birdsong, 39 Tenn. 289, 301."

(7) "We think appellee has made out its case. Upon the record it was conducting a lawful business. The fraud order was void as a matter of law. Appellant was excluding appellee from the use of the mails without authority. He was destroying appellee's mail order business, which was ninety-five per cent of the whole. He was almost, if not altogether, a trespasser upon appellee's rights and privileges. It is true enough that he was not wilfully committing a wrong. Be it said to his credit, that he was only obeying orders, but he was acting unlawfully and the effect was the same. A stronger case for injunctive relief can hardly be stated. The Postmaster General did not seek to intervene. If he had done so, he

would have been bound upon the question of the validity of the fraud order upon the record as made, just as we have indicated appellee was bound by it.

"Under these circumstances what course should the District Judge, sitting as a Chancellor, have pursued? Should he have turned appellee out of court and sent it to Washington for a second contest over the same matter? The dismissal of the bill would have been disastrous to appellee and the expense incident to new litigation hundreds of miles from home would have been equally crushing because its business, grossing only a few thousand dollars a year, would have been burdened with the extra expense of the new litigation. The District Judge made the injunction final and we think that this was right. It would have been unjust and inequitable to have dismissed the bill for no other or better reason than adherence to a formal, and what we regard as an inapplicable, rule of equity pleading.

"Courts of equity have always struggled against technical rules which impede rather than contribute to substantial justice."

The *Shackleton* case pretty well presents the situation here and is followed in all respects by *Pinkus v. Walker*, 61 Fed. Supp. 610 (N. J., 1945), which is also a fraud order case involving the sale of a reducing program.

POINT III.

The Ruling of the Circuit Court of Appeals of the Ninth Circuit in Affirming the Judgment of the District Court in This Case, Entirely Disregards the Clear Principle Established by This Court in American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, That the Postmaster General Is Without Authority or Discretion in the Presence of Opinion Evidence Alone.

The judgment of the Circuit Court in this case is based entirely upon its former ruling in the case of *Neher v. Harwood, supra,* although the cases differ widely in basic facts and particularly in the fact that *the evidence before the Postmaster General in the case of Neher v. Harwood included the testimony of a user of the scheme involving the cosmic generator to the effect that the claims made were false and untrue by actual test,* while the evidence to establish fraud in the instant case consists only of the mere expressions of opinion of one witness.

The opinion and ruling of the District Court also turns entirely upon the decision by the Circuit Court in the case of *Neher v. Harwood* [R. 271-275].

In the Memorandum Opinion of the District Court it is stated as follows:

> "this Circuit in Neher v. Harwood, 128 Fed. (2d) 846, decided in 1942, and is the last expression of this Circuit on the subject, has specifically held that the McAnnulty case is not authority for the non-joinder of the Postmaster General as a party. The case, as I have indicated, is in direct conflict with the decisions of the Sixth Circuit" [R. 274].

Petitioners do not claim that the *McAnnulty* case is authority for the non-joinder of the Postmaster General,

but do claim that it holds that the Postmaster General has no authority to issue a fraud order on opinion evidence alone and if he does so that the order is void.

Petitioners further claim that *Neher v. Harwood* holds that the Postmaster General is not an indispensable party when his authority to act is questioned.

In the instant case the Postmaster General acted beyond his authority by issuing a fraud order upon opinion evidence alone and it naturally follows by the authority of the *McAnnulty* case and *Neher v. Harwood* taken together, that he therefore is not an indispensable party.

In the case of *Neher v. Harwood*, the Court said (page 848):

> "The appellant in the instant case has urged that the case of America School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 S. Ct. 33, 47 L. Ed. 90, which was one of the very cases to which the Supreme Court referred in the above question, is authority for their contention that the local Postmaster may be sued without the joinder of his superior officer. It is apparent that the case is not authority on the point."

Petitioners do not claim that the case is authority on the point because that point was never mentioned in the *McAnnulty* case although it does hold that the question of the statutory authority of the Postmaster General is a question of law. The case holds further that the Postmaster General acts beyond his authority and is guilty of a mistake of law when he issues a fraud order upon opinion evidence alone and in such case the fraud order is void. The case of *Neher v. Harwood* itself supplies the

only other point necessary to uphold appellant in the instant case, to-wit: That when the Postmaster General exceeds his authority in issuing a fraud order, he is not an indispensable party defendant but the local postmaster may be sued alone.

The *Neher v. Harwood* opinion refers once more to the *McAnnulty* case, as follows (page 853):

> "Appellant has patterned his complaint upon the case of McAnnulty, *supra*, and relies upon that case. The facts of the two cases are not parallel. There there was involved a school for the understanding mind. Here no understanding of any kind is premised. We hold that no cause of action was stated."

In the *McAnnulty* case the Court went to some length to establish that its ruling applied equally to all cases in which opinion formed the basis rather than existing facts.

The Circuit Court completely ignored the fact that the complaint in this action is based upon the express claim that the Postmaster General had no authority to issue the fraud order in question and that the order is void [R. 259, 264-265] for the reason that he had no authority to act at all upon the evidence before him. The clear ruling of *Neher v. Harwood, supra*, is that:

> "Where he was without authority to act at all in the premises his actions assuming to authorize action by the subordinate were of no validity and left the subordinate as the actor subject to restraint."

If, therefore, the Postmaster General is without authority to issue a fraud order upon opinion evidence alone, which is the clear and positive ruling in the *McAnnulty* case, *supra*, the case of *Neher v. Harwood* is itself authority for holding that he is not an indispensable party.

POINT IV.

The Sixth and Ninth Circuit Courts of Appeals Are in Conflict as to Whether or Not the Postmaster General Is an Indispensable Party to an Action to Enjoin the Enforcement of His Fraud Order by the Local Postmaster.

NINTH CIRCUIT.

The authority upon which are based the judgments of the Circuit and District Courts in the instant case, is *Neher v. Harwood*, 128 F. (2d) 846, Ninth Circuit (1942), which holds that the Postmaster General is not an indispensable party to the action when his authority to make the order is questioned.

The case seems to intimate that this authority must be questioned upon the ground that the statute is unconstitutional and refuses to recognize any other ground as a basis for questioning that authority.

As was said by Mr. Justice Holmes and Mr. Justice Brandeis dissenting in the case of *Leach v. Carlisle*, 258 U. S. 138, 140:

> "The statute under which fraud orders are issued by the Postmaster General has been decided or said to be valid so many times that it may be too late to expect a contrary decision."

So that any question of the authority of the Postmaster General upon constitutional grounds appears futile as evidenced by the holding of the District Court in the *Neher* case that "no substantial constitutional question is involved." The result of *Neher v. Harwood*, therefore, is that the Postmaster General is an indispensable party unless the foundation of his authority is questioned upon.

the ground of unconstitutionality of the statute and, when so questioned, no substantial constitutonal question is involved because the constitutionality of the statute has been decided many times.

Consequently the result of *Neher v. Harwood* is to require everyone against whom the Postmaster General issues a fraud order, to go to Washington to file the action which would make immediate relief out of the question. The further result is that it is impossible to obtain quick relief in the Ninth Circuit in cases in which the Postmaster General has acted upon the most insubstantial evidence or upon opinion evidence of the most insubstantial character.

The Ninth Circuit Court of Appeals clearly ignores and refuses to follow the definite and positive ruling of this Court in the *McAnnulty* case, that the Postmaster General has no authority under these statutes to issue a fraud order upon opinion evidence alone, and if he does so, he acts under a mistake of law and his act is void.

It should be stated further that the statutory power of an administrative official is a question of law which can be decided in any appropriate forum without his presence being necessary. *Varney v. Warehime*, 147 F. (2d) 238, 242.

Jarvis v. Shackleton Inhaler Co., 136 F. (2d) 116, Sixth Circuit (1943), and *Pinkus v. Walker*, 61 Fed. Supp. 610 (N. J., 1945), are both cases against the local postmaster alone in which it was sought to enjoin the

enforcement of a fraud order issued by the Postmaster General without joining him as a party. No constitutional question is involved.

Both cases decide that the Postmaster General is not an indispensable party because courts of equity observe general rules only to the extent to which they contribute to the attainment of justice and that they do not adhere to any rule which would defeat justice and thus destroy the very purpose for which they were created. The *Pinkus* case from a District Court in the Third Circuit follows the case of *Jarvis v. Shackleton* in the Sixth Circuit and both cases cite and follow the *McAnnulty* case and hold that the Postmaster General has the right of intervention if he so desires.

SIXTH CIRCUIT.

Varney v. Warehime, 147 F. (2d) 238, Sixth Circuit (1945), and *Greer v. Cline*, 148 F. (2d) 380, Sixth Circuit (1945), were both cases involving the question of whether or not the War Food Administrator was an indispensable party to an action seeking to enjoin his subordinate, the local Inspection Supervisor.

The Court decided in both cases that "governmental regulations under the present circumstances are so widespread and effect such a vast number of our people that those who in good faith believe a public official is proceeding beyond his jurisdiction should be permitted to litigate the question if the officer before the Court is such an agent in the matter involved that it is reasonable to proceed to an adjudication of the issue with finality." and ruled that the superior was not an indispensable party.

Conclusion.

It would appear, therefore, that there is a sharp conflict upon this question between the Sixth and Ninth Circuit Courts of Appeals and that the Circuit Court of Appeals for the Ninth Circuit has decided an important question of general law in a way probably untenable and in conflict with the weight of authority and probably in conflict with applicable decisions of this Court.

Petitioners further believe that there is here involved an important question of Federal law not previously settled, which is of such wide importance and public interest and concern that it should be definitely decided by this Court.

Respectfully submitted,

IRVING M. WALKER,
Attorney for Petitioners.

RICHARD L. NORTH,
Of Counsel.

APPENDIX.

Opinion of the District Court in the Instant Case.

[Title of District Court and Cause]

Reporter's Transcript of Opinion

Honorable Peirson M. Hall, Judge Presiding

Los Angeles, California, March 4, 1946

Appearances:

For the Plaintiff Richard L. North, Esq., 402 Merritt Building, Los Angeles, California.

For the Defendant: Charles H. Carr, United States Attorney; by Ronald Walker, Assistant United States Attorney.

Los Angeles, California, March 4, 1946:
10:00 o'clock A. M.

The Court: In the matter of Williams v. Fanning, the matter was submitted and the parties have nothing further to offer?

Mr. Walker: Nothing further on behalf of the defendant.

Mr. North: Nothing further, Your Honor.

The Court: In this matter I haven't written an opinion but I made a very short memorandum because the matter is one of injunction and urgency so I want to announce my opinion this morning.

The Los Angeles Postmaster, by the United States Attorney, seeks dismissal of this action to enjoin him from enforcing a fraud order against the plaintiff on the

ground that the Postmaster General is an indispensable party.

There is a welter of decision on the subject, so much so that in 1940 the Supreme Court remarked, in Brooks v. Dewar, 313 U. S. 354, that they were "not disposed to attempt a critique of the authorities."

There is direct conflict between the Sixth Circuit and the Ninth Circuit, and the District Court of New Jersey, which is in the Third Circuit, in July of 1945 followed the Sixth Circuit in Pinkus v. Walker, 61 Fed. Supp. 610.

In the Sixth Circuit cases (there are two of them), Jarvis v. Shackelton, 136 Fed. (2d) 116 (June, 1943), and Greer v. Kline, 148 Fed. (2d) 380 (March, 1945), as well as Pinkus v. Walker, all adhere to and follow the doctrine of the American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, to the effect that if there is no substantial evidence of actual fraud in fact, and only opinion evidence before the Postmaster General, to support a fraud order, then the order of the Postmaster General is beyond his authority in law and he is not an indispensable party.

The McAnnulty case, as recently as February 4, 1946, was cited by the Supreme Court in a selective service case, Estep v. U. S., as being authority for the proposition that the courts have the power to review factual findings to determine whether or not, by virtue of the lack of evidence, there has been an excess of lawful authority of the administrative body or board.

In the instant case, except for the evidence of mailing and a chemical analysis of some food tablets—and the chemical analysis bore out the plaintiff's representations—

there was no evidence at all before the Postmaster General except the testimony of an employee of the Food and Drug Administration of the government, who testified as a medical expert as to the efficacy, in his opinion, of plaintiff's plan of reducing obesity. Although the record shows that upwards of 50,000 persons had used plaintiff's plan in whole or in part, which included not only dieting but exercises in some cases as well, not one of them, nor any other person, was produced to testify as to any matter at all. The plaintiff was excluded from testifying as to his actual experience with his plan on persons other than himself. And on a motion for reopening to permit medical testimony on behalf of the plaintiff, the motion was denied although the hearings were held in Washington, D. C., and the plaintiff had no notice of the plan of the Postmaster General to produce or rely on medical opinion evidence.

The McAnnulty case is clearly authority for the proposition that the statute does not authorize the Postmaster General to be an arbiter of medical opinion and to use the terribly effective power of the denial of the mails based solely upon that opinion. In Hannegan v. Esquire, decided February 4th of this year, where the Supreme Court construed the second class mailing statute, they held there that the powers, although just as great under that statute in the Postmaster General as in the fraud statute, did not authorize him to be an arbiter of what was literature or what was art or what was moral.

In the instant case, having read the entire transcript, I find that there is no substantial evidence to support the fraud order of the Postmaster General. And I would follow the decisions of the Sixth Circuit were it not for the fact that this circuit, in Neher v. Harwood, 128 Fed.

(2d) 846, decided in 1942 and is the last expression of this circuit on the subject, has specifically held that the McAnnulty case is not authority for the non-joinder of the Postmaster General as a party. The case, as I have indicated, is in direct conflict with the decisions of the Sixth Circuit. While it is true that the plaintiff, by being denied the injunction, is being turned out of this, the court of his residence, and will be forced to go almost 3000 miles to the District of Columbia to secure jurisdiction of the Postmaster General, which in normal times is no small inconvenience and expense, and in these times requires the foresight and planning almost of a major expedition, and while it is true that the Postmaster General can actually and in fact present any and all defenses to the courts of this district through the office of the United States Attorney as well and as easily as could be done in the District of Columbia, inasmuch as the power of any court in this kind of a case is limited to reviewing the naked record, so that driving the plaintiff out of these courts to the District of Columbia, where the Postmaster General lives, is paying obeisance to an outmoded, if not a ridiculous, fiction, I nevertheless feel bound to follow the Circuit Court of Appeals of this district as laid down in Neher v. Harwood, with which conclusion, I might say, I do not agree, and must and do reluctantly hold that the Postmaster General is an indispensible party and will be compelled to so hold until the Ninth Circuit and the Sixth Circuit come into harmony in their opinions, or the Supreme Court resolves the conflict between them.

The motion of the defendant to dismiss is granted, which being so it is unnecessary to pass on the motion for a preliminary injunction.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 1083.

AL WILLIAMS, *et al.*,

Petitioners,

vs.

MICHAEL J. FANNING, *et al.*,

Defendants.

PETITIONERS' BRIEF ON THE MERITS.

Statement of Facts.

Petitioners filed suit in the District Court to enjoin the local Postmaster at Los Angeles, California, from enforcing a fraud order [R. 257] of the Postmaster General purporting to have been issued under the so-called Postal Fraud Order Statutes (U. S. C. A., Title 39, Secs. 259, 732; R. S. 3929, 4041). Petitioners sought injunctive relief upon the ground that the Postmaster General had exceeded his authority in issuing the order upon opinion evidence alone and without substantial evidence of actual fraud in fact [R. 259, 264-265], and by leave of Court filed their Amended Complaint [R. 230, 231-270] in order to eliminate all Constitutional questions.

Respondent moved to dismiss the action upon the ground that petitioners had failed to state a claim upon which

relief could be granted [R. 229]. The District Court reluctantly granted the motion upon the ground that the Postmaster General is an indispensable party to the action [R. 276], basing the ruling solely upon the case of *Neher v. Harwood*, 128 F. (2d) 846, with which the Court stated it did not agree but felt bound to follow [R. 274, 275].

On December 6, 1946, the Circuit Court of Appeals for the Ninth Circuit rendered its opinion *per curiam* affirming the judgment of the District Court upon the authority of *Neher v. Harwood, supra.*

On April 14, 1947, this Court granted the Petition herein for a Writ of Certiorari, limited, however, to the first question presented by the Petition for the Writ [R. 289], which reads as follows [p. 4]:

> "1. When the authority of the Postmaster General to issue a fraud order is the ultimate question raised by the complaint, is he an indispensable party to an action against the local Postmaster to enjoin the enforcement of the order?"

Petitioners rely not only upon the allegations in their Amended Complaint [R. 231-270] which must here be assumed to be true, but also upon the complete transcript of evidence taken before the Post Office Department [R. 44-218], and the Findings of Fact of the Postmaster General [R. 219-228] which are, respectively, "Exhibit A" and "Exhibit B," attached to the Amended Complaint, together with the fraud order in question which is therein set forth in full [R. 257-258].

Argument.

Inasmuch as the judgments of both the District and Circuit Courts below were based squarely upon the case of *Neher v. Harwood*, 128 F. (2d) 846 (9th Cir.), consideration of that decision seems appropriate.

Analysis of Neher v. Harwood.

The plaintiff in that case was engaged in the operation of a "cosmic generator" into which he placed a prayer card containing the customer's name, claiming that the generator gathered health waves or forces which were distributed with beneficial effect upon the health of the customer, and used the mails in selling the service for individual and family treatment.

Plaintiff claimed that the Postmaster General acted beyond his jurisdiction in issuing a fraud order and sought to eijoin the local postmaster from enforcing it. No constitutional question was involved. The defendant moved to dismiss upon the ground that the Postmaster General was an indispensable party.

The usual hearing was had before the Post Office Department at which a customer or purchaser of plaintiff's prayer card service gave his testimony to the effect that he had used the service and had derived no benefit whatever therefrom. In this important particular the case differs from the one now before this Court.

In the beginning the opinion in *Neher v. Harwood, supra*, makes the following statement (p. 847):

> "In view of the fact that there is confusion in Courts as to the necessity of joining superior officers when acts of subordinates are sought to be enjoined

we have made a fairly thorough examination of the decisions and opinions upon the subject in an attempt to discover a principle which will largely reconcile them."

Then follows an extended consideration of *Warner Valley Stock Company v. Smith*, 165 U. S. 28; *Gnerich v. Rutter*, 265 U. S. 388; *Webster v. Fall*, 266 U. S. 507; *Moody v. Johnston*, 9 Cir., 66 F. (2d) 999; *Berdie v. Kurtz*, 9 Cir., 75 F. (2d) 898; *Ferris v. Wilbur, Secretary of the Navy, et al.*, 27 F. (2d) 262; *Yarnell v. Hillsborough Packing Company*, 70 F. (2d) 435; *Ryan v. Amazon Petroleum Corporation*, 71 F. (2d) 1; *Rood v. Goodman*, 83 F. (2d) 28; *National Conference on Legalizing Lotteries, Inc., v. Goldman*, 85 F. (2d) 66, and *Colorado v. Toll*, 268 U. S. 228. Referring to *Colorado v. Toll, supra*, and in distinguishing it from *Webster v. Fall, supra*, and *Gnerich v. Rutter, supra*, the Court expresses its conclusions in the following language (1), page 849:

"(1) The plaintiff in this case, it is clearly seen, was not claiming that the superior officer had abused a discretion legally vested in him, but rather that he had no statutory authority whatsoever, to issue the regulation complained of.

"The confusion as to this case and the *Gnerich* and *Webster* cases now clears. The Supreme Court in *Colorado v. Toll* did not overrule these two former cases, but instead properly and logically discerned the principle upon which they differed. In the two former

cases the superior officer had acted under a statute which was not attacked as unconstitutional, but it was contended that the superior had in some manner abused his discretion and in such circumstances it was held that he should be made a party to the action in order to defend his direction and regulations. Where he was without authority to act at all in the premises his actions assuming to authorize action by the subordinate were of no validity and left the subordinate as the actor subject to restraint."

The Court then further states (p. 851):

"It would serve no useful purpose to go into all of the other cases on the subject in great detail. The following, however, are cases in which the plaintiff attacked the very authority of the superior officer to act or issue the regulations complained of, as contrasted with an attack on the regulations as such; and where the superior officer was held not to be an indispensable party. Hill v. Darger, *et al.*, D. C. Cal., 8 F. Supp. 189; Eastman v. United States, D. C. Wash., 28 F. Supp. 807."

"Cases in which the authority of the superior officer was not attacked, and where the superior officer was held to be an indispensable party are: Wheeler v. Farley, D. C. Cal., 7 F. Supp. 433; Redlands Foothill Growers *et al.* v. Jacobs, D. C., 30 F. Supp. 995; Hawthorne v. Fisher, D. C. Tex., 33 F. Supp. 891; Barr v. Rhodes, D. C. Ky., 35 F. Supp. 223; Scientific Mfg. Co. v. Walker, D. C. Pa., 40 F. Supp. 465; Acret v. Harwood, D. C. Cal., 41 F. Supp. 492."

The Court holds that no cause of action was stated.

The decision conveys the impression that the authority of the Postmaster General cannot be questioned except upon constitutional grounds, which, if true, would render it impossible to question his authority at all, for, as stated by Mr. Justice Holmes and Mr. Justice Brandeis dissenting in the case of *Leach v. Carlisle*, 258 U. S. 138, 140:

> "The Statute under which fraud orders are issued by the Postmaster General has been decided or said to be valid, so many times that it may be too late to expect a contrary decision."

The net result of the decision is an enunciation of the rule already established by this Court that the superior is never an indispensable party to the action when the plaintiff attacks his authority to act or to issue the order or regulation complained of, which rule has long prevailed, being laid down by this Court in *Colorada v. Toll*, 268 U. S. 228, 230, which was an action to enjoin the superintendent of a National Park from enforcing certain regulations for the government of the park. The Secretary of the Interior, who was the superior official, was not joined in the action, the Court expressly deciding that a bill in equity was the proper remedy and that it could be pursued without joining the superior officer. The question presented by the complaint was whether or not the

Park Superintendent was doing something which he had no authority to do in attempting to enforce certain regulations of the Department of the Interior. Mr. Justice Holmes delivered the opinion of the Court which contains the following statement at page 230:

> "The object of the bill is to restrain an individual from doing acts that it is alleged that he had no authority to do, and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States. Missouri v. Holland, 252 U. S. 416, 431; Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620."

The rule has been uniformly followed and is based, of course, on the proposition that, when the authority of the superior is attacked, the question presented is one of law, the decision of which does not require his presence.

The cases of *Varney v. Warehime*, 147 F. (2d) 238, 242, and *Greer v. Cline*, 148 F. (2d) 380, both from the Sixth Circuit and quoted at length on pages 37, 38 and 39 of Petitioners' Brief Supporting the Petition, are more recent cases following the rule.

Petitioners' Complaint Is an Attack Upon the Authority of the Postmaster General to Issue the Fraud Order, Upon the Ground That He Issued the Order Solely Upon Opinion Evidence and Without Substantial Evidence of Actual Fraud in Fact.

After setting forth the complete record before the Postoffice Department, Paragraphs XX and XXVI of the Amended Complaint appearing on pages 259 and 264, respectively, of the Record, read as follows:

"XX.

That by reason of being unsupported by any substantial evidence in fact, and by reason of the facts herein alleged, said order is void and issued without and beyond the authority and jurisdiction of the Postmaster General, and of said Post Office Department, and beyond the authority conferred upon them by the Acts of Congress."

"XXVI.

That, . . . the said order is void and of no effect and was issued without substantial evidence in fact and beyond the jurisdiction of the Post Office Department and of the Postmaster General and beyond the authority conferred or intended to be conferred by Congress."

The Complaint is in no sense a claim of abuse of discretion for there is no discretion when authority is lacking and it has no other basis and presents no other question than the authority of the Postmaster General to issue the order and his authority is attacked upon the

ground that the order is based solely upon opinion evidence and is therefore void.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, and more than one hundred cases in which it is cited and approved.

That the Postmaster General is without authority to issue a fraud order based upon opinion evidence alone is considered at length on pages 29 to 36, both inclusive, of Petitioners' Supporting Brief.

That he has done so in this case is clearly evident from an examination of the complete record before the Post Office Department [R. pp. 44-218], with which conclusion the District Court below agreed [R. pp. 272-273].

Conclusion.

It would seem that the *McAnnulty* case, *supra*, in deciding that the Postmaster General has no authority to issue a fraud order based only upon opinion evidence, harmonizes all of the decisions on the question of his presence as an indispensable party. The decision in that and in every similar case is one of authority and whether or not he acted without authority and issued a fraud order upon mere expressions of opinion and without substantial evidence of actual fraud in fact is a question subject for review by the courts, and in no such case is the Postmaster General an indispensable party and his personal presence would not assist him or anyone else and would not be likely even in Washington, the records

of the Postoffice Department being all that are required to enable the Court to decide whether or not the evidence was substantial and factual, or mere expressions of opinion.

Beyond question the Postmaster General is not an indispensable party to an inquiry into his authority. Equally without question, he is without authority to issue a fraud order based upon opinion evidence alone. It naturally follows that he is not an indispensable party to an inquiry to determine whether or not he issued a fraud order without having before him substantial evidence of actual fraud in fact. Appellants believe that this is such an action and his authority is expressly questioned and put in issue by the allegations of the complaint.

Petitioners respectfully submit that the record clearly shows that the Postmaster General issued the fraud order in question upon opinion evidence alone; that the complaint presents an attack upon the authority of the Postmaster General to issue the order and that he is therefore not an indispensable party to the action and the motion to dismiss should have been denied.

IRVING M. WALKER,
Attorney for Petitioners.

RICHARD L. NORTH,
Of Counsel.

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No. 1083 47

In the Supreme Court of the United States

OCTOBER TERM, 1946

AL WILLIAMS AND AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., A CORPORATION, PETITIONERS

v.

MICHAEL J. FANNING, INDIVIDUALLY AND AS POSTMASTER OF THE CITY OF LOS ANGELES, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California, Central Division (R. 271–275) is not reported. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 286) is reported at 158 F. 2d 95.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 6, 1946 (R. 287). The

petition for a writ of certiorari was filed March 1, 1947. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Postmaster General is an indispensable party to the action to restrain a local postmaster from carrying into effect a postal fraud order.

2. Whether in the circumstances of the present case the opinion testimony of a medical expert was substantial evidence, sufficient to support the fraud order issued by the Postmaster General.

STATUTES INVOLVED

The pertinent portions of R. S. 3929 and 4041 (39 U. S. C. 259 and 732) are set forth in the Appendix *infra*, pp. 22–23.

STATEMENT

On May 25, 1945, the Post Office Department forwarded to petitioners a memorandum charging them with violations of the postal fraud statutes in connection with their sales through the mails of tablets called "Foods That Take Hunger Away" together with "Al Williams (weight) Reducing Plan" and a "Special Body Massage Creme," and ordered them to show cause why a fraud order should not issue (R. 45, 236). The

memorandum charged that petitioners falsely and fraudulently pretended, represented and promised:

> That obese persons will lose weight easily and safely through use of the said plan regardless of the number of pounds they are overweight or of their age or failure to reduce by other methods;
>
> That the said plan does not include a "strict diet;"
>
> That said tablets contain foods which eliminate hunger, and that the taking of these tablets in connection with the said plan will prevent the users from becoming hungry;
>
> That a few days' use of the said plan and tablets will result in the user's loss of his desire to overeat and cause him to "feel full of pep and have more energy;"
>
> That said "Special Body Massage Creme" will eliminate "flabby flesh" caused by the loss of weight; and
>
> That the said "Creme will beautify the contour of the throat, bust and upper arms, calves of legs and thighs." (R. 45–46, 236–237)[1]

[1] At the hearing, the hearing officer permitted the amendment of the memorandum of charge to include an additional charge on the condition that if petitioners were thereby subjected to any hardship as a result of being unprepared in that charge, the hearing officer would "take care of the situation for [them]" (R. 51). Petitioners have never complained of hardship as a result of the allowance of this amendment.

Petitioners filed an answer denying the charges (R. 52–56).

On June 20, 1945, a hearing was held at Washington, D. C., at which petitioners appeared and were represented by counsel (R. 44). At the hearing numerous advertisements of petitioners' scheme which had appeared in various newspapers and periodicals were introduced, as was printed literature sent by petitioners through the mails in response to test letters (R. 59–90). Excerpts from these materials follow:

> Reducing Can Be Fun With Foods That Take Hunger Away. Try this New Amazing Method! It's simple—easy to follow. No "Canary diets" or strenuous exercises (R. 59, 62).
>
> * * * * *
>
> Men! Women! Amazing New Way to Lose Weight
>
> With Foods That Take Hunger Away! Look younger! Feel Better! If you are overweight SEND NOW for proven plan that has helped thousands from coast to coast shrink 5 to 10 inches around the waist, bust, hips! Get rid of dizziness, shortness of breath, heart palpitation, head and back pains, blood pressure and other symptoms due to excess weight. Send today for FREE information on my proven Reducing Plan with Foods That Take Hunger Away. No starvation diets. No thyroid or harmful drugs. Not sold in

stores. WRITE NOW FOR FREE DATA, Al Williams Health System (R. 60–61).

* * * * *

These food tablets contain NO DRUGS—NO THYROID MATERIALS—NO MEDICINES OF ANY KIND. IN FACT, NOTHING THAT COULD NOT BE GIVEN TO A CHILD WITH SAFETY (R. 71).

* * * * *

REDUCING IS MADE EASY, in a SENSIBLE WAY. It is logical that if you cut down the amount of food usually taken, you are bound to reduce. But the problem arises that when you cut down on your food intake, you become hungry, have a craving for more food, and cannot diet without often injuring your health. It is impossible to go very long on a rigid diet. IT IS NOT DIFFICULT TO STAY WITH MY PLAN. It is amazing what you will be able to do when you CHANGE your blood stream with FOODS that bring you down to your normal weight. Not only will you look better, but you will FEEL BETTER, more ANIMATED and MORE VIGOROUS (R. 66).

* * * * *

These foods, contain 17 different fruits, minerals and vegetables, dehydrated into pleasant tasting tablets. I usually suggest taking of them before meals, and whenever you feel hungry during the day. You will find that after a few days you will not crave to overeat, and you will feel full of pep and have more energy. If you diet

without taking these food supplements, you become too hungry, tired and nervous to stay with a low caloric diet long enough to lose weight. (R. 70–71).

* * * * *

THE SPECIAL BODY MASSAGE CREME which I have found so effective in reducing programs in my own establishments should be used. I have found this Creme very valuable to firm the skin as the fat melts away. When used it tends to tighten the skin so that those pounds you lose won't leave "sags" where extra pounds used to be. It is also beneficial when used as directed to beautify the contour of the throat, bust and upper arms, calves of legs, and thighs (R. 77).

The plan so advertised by petitioners consisted of the taking of tablets in conjunction with a restricted diet. Under the plan the diet was to be restricted to certain lean foods and one tablet was to be taken before breakfast, two at noon, and two before dinner, with the additional tablets to be taken any time during the day. The total tablets taken daily was not to exceed ten (R. 81). The plan operated in two alternate phases; a two-meal-a-day phase, which lasted for eleven days, on the fourth and eighth days of which only tablets were to be taken, together with a liquid, such as vegetables or fruit juice or soup, or even plain water (R. 82); a three-meal-a-day phase, which lasted the rest of the month, during which three meals a

day could be eaten, but only tablets in liquid and no meals were to be taken every third day (R. 82–83). Thereafter the whole program was to be repeated (R. 82).[2]

Chemical analysis showed the tablets to contain sodium and potassium oxides, kelp, iron, calcium oxide, and a trace of iodine (R. 92). Microanalysis of a composite of 15 tablets revealed appreciable amounts of alfalfa leaf and stem, wheat flour and soy bean flour, small amounts of rhubarb root, parsley leaf, spinch leaf, lettuce leaf, beet leaf, celery seed, capsicum fruit, carrot, animal meat tissues and asparagus, and trace of yeast, kelp and ginger rhizome (R. 95). No trace of watercress, endive, escarole, or chicory were found, as marked in the label (R. 96). The analysis of the petitioners' cream showed that it contained phenol, or carbolic acid, volatile oils consisting of menthol, camphor eucalyptus, and water incorporated in a greaseless base (R. 93).

Dr. Lawrence E. Putnam, a physician, who had made a special study of obesity, its causes and treatment, and who had had considerable practice

[2] As part of the plan there was an "Internal Bathing Plan" which consists of a series of enemas which the person following the diet was instructed to follow (R. 84). In lieu of enemas "Activators" could be taken (R. 84). These "Activators" were mild laxatives (R. 212). The plan also included "THE 'Magic Seven' EXERCISES" (R. 84), which, however, were optional and therefore not included in the charges (R. 147).

in internal medicine both in clinics and in the private practice of medicine (R. 103–106), testified that the principal cause of obesity is the eating of more food than the activities of one's body demands (R. 107); that the general principles of reducing are the same for all persons, but the details vary with age, sex, occupation, previous diseases, present physical examination, laboratory tests, etc. (R. 109, 121); and that answers to petitioners' self-analysis chart sent through the mails were inadequate from which to determine whether or not it was safe for a patient to reduce (R. 115) since "all patients should receive a complete history, a complete physical examination and laboratory work when indicated" (R. 116). He testified that some obese persons would be harmed by the loss of "10 pounds * * * in 3 days, 35 pounds * * * in 30 days" and "73 pounds in six months" (R. 117, 119); that some obese people with, for example, tuberculosis, have been made overweight purposely by a physician and would, if they reduced, expose themselves to a reactivation of that disease (R. 110); that a patient with diabetes might, by a sharp reduction in diet, be thrown into acidosis, which is a serious condition (R. 119, 128), and, further, that as a result of low calorie intake, one can get hypoglycemic reactions in which the blood sugar becomes low and the patient may become dizzy and faint (R. 128, 137).

Dr. Putnam's testimony further showed that the diet sold by petitioners was a "strict low calorie diet" (R. 121); that during the two-meal-a-day phase, the diet provided 600 calories daily, except every fourth day when the calorie intake was about 500 calories as a result of taking only the tablets with a liquid (R. 121–123); in the three-meal-a-day phase, the total calorie intake would be about 750 calories daily, except on every third day when only the tablets were taken with a liquid (R. 122); that each of the tablets alone provided about 2 calories (R. 123); that the average obese person took in about 3,500 to 4,000 or more calories per day (R. 123); and that it would not be easy for such a person to follow such diet (R. 124). Dr. Putnam also testified that the food contained in the tablets would not eliminate hunger pains (R. 127, 152); although when taken with a liquid, the liquid might cause hunger pains to disappear temporarily (R. 154–155); that they would not dissipate the craving to overeat, nor would they give more energy or pep (R. 128); and that the diet plus the tablets would not accomplish anything that a low calorie diet alone would not accomplish (R. 131).

In regard to the effect of petitioners' cream on the skin, Dr. Putnam testified that regardless of the length of time it was used, the ingredients of the cream were such that it would have no effect on flabbiness resulting from reduction in weight

(R. 133), nor would it have any effect on the contours of the throat, bust and upper arms, calves of legs and thighs (R. 134).

Petitioners offered no expert medical testimony. Petitioner Al Williams testified that he had started in 1906 as an athlete, boxing and wrestling, up to 1916 as a professional (R. 158); that he had been in the natural conditioning business for a long while (R. 157–160); that he had become interested in concentrated nutrition in 1935 (R. 160–161); that he had experimented on himself for about two years with "amazing results" (R. 161). He, however, was not permitted to give testimony concerning the efficacy of his plan in reducing obesity because he was not qualified to give expert medical testimony (R. 161–164). Various testimonial letters were also rejected on the ground that they were hearsay and the writers thereof were not qualified to give expert medical testimony (R. 169–173), although various letters were received and marked for identification (R. 173–178). On cross-examination, Mr. Williams testified that his weight ran between 220 and 240 pounds (R. 183); that he would be sick if he reduced to 184 pounds, which he was told was the average weight for a man his size (R. 184); that he knew nothing specific about how the particular people to whom he sold his plan reacted under the plan except from the questionnaire of four questions he sent them two months after they had

started the plan (R. 185, 202–203);[3] that people who would be made sick by following the plan would not go beyond their own limitations (R. 185) because "nature won't allow it" (R. 186), and because the persons who buy the tablets "must have intelligence because otherwise they wouldn't buy" (R. 187).

At the close of the hearing, petitioners were furnished a copy of the transcript of the hearing (R. 227); and subsequently moved to reopen the case for the reception of additional testimony to be taken by deposition in Los Angeles, California (R. 228, 260–264). This motion was denied (R. 228, 264). Thereafter, petitioners moved that "all possible scientific tests be made and obtained by the Post Office Department to determine the efficacy of the tablets sold by [petitioners] for the elimination of prevention of hunger when used in connection with the reducing plan" (R. 228). This motion was likewise denied (R. 228). Original and supplemental briefs were filed by petitioners (R. 228).

Upon the basis of the foregoing evidence, the Solicitor of the Post Office Department made findings of fact and recommended that a fraud order be issued (R. 219–228). Thereafter on De-

[3] The four questions were as follows:
Did you follow the food plan?
Did you follow the bathing plan?
Did you take the internal bath as directed?
Did you use the massage cream? How much weight have you lost?

cember 10, 1945, the Acting Postmaster General issued an order to the postmaster at Los Angeles, California, forbidding him to pay any money order drawn to the order of petitioners and directing him to inform remitter of such money order that payment had been forbidden, and to return all letters addressed to petitioners to postmasters at the office where they were originally mailed, for delivery to the sender, with the words: "Fraudulent: Mail to this address returned by order of Postmaster General" written or stamped upon the outside of the letters or other mail matter (R. 257–258).

On January 7, 1946, petitioners filed in the United States District Court for the Southern District of California, a complaint against respondent herein, "Individually and as Postmaster of the City of Los Angeles, California" (R. 2, 231).[4] Alleging that the fraud order was "unsupported by any substantial evidence in fact" (R. 259) and that it was "issued by the Postmaster General without authority and beyond the power granted to him by Congress" (R. 232),[5] the

[4] Copies of the transcript of the proceedings (R. 44–218) and of the "Memorandum for the Postmaster General Embodying a Finding of Fact and Recommending the Issuance of a Fraud Order" (R. 219–228) were filed with the complaint as Exhibits A and B, respectively.

[5] The complaint was amended to eliminate the constitutional questions raised in the original complaint. Compare R. 231–270 with R. 1–43; see Pet. 3, 17.)

complaint prayed that the order be vacated and that respondent be enjoined from carrying out the order (R. 269). Respondent moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted (R. 229).

The district court concluded that the testimony of Dr. Putnam was opinion evidence and, relying on the doctrine of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, it held that such evidence was insufficient to support the fraud order of the Postmaster General (R. 272–273). However, since the Postmaster General had not been joined as a party, the district court felt bound to dismiss the complaint under *Neher* v. *Harwood*, 128 F. 2d 846, in which the Circuit Court of Appeals for the Ninth Circuit had held that in proceedings such as these the Postmaster General was an indispensable party (R. 274–275, 276). Upon appeal, the court below affirmed *per curiam*, citing *Neher* v. *Harwood*, *supra* (R. 286).

ARGUMENT

The principal question raised by the petition for writ of certiorari, and the only question of general importance, is whether the Postmaster General is an indispensable party in a suit to enjoin a subordinate postmaster from carrying out a fraud order issued by the Postmaster General. There is no question presented as to the

validity of the statute pursuant to which the order was issued; indeed petitioners' complaint was amended to remove all constitutional questions raised in the original complaint (see Pet. 3, 17).

1. The holding of the court below that the Postmaster General is an indispensable party to the instant proceeding follows the earlier decisions of that court in *Neher* v. *Harwood*, 128 F. 2d 846, certiorari denied, 317 U. S. 659, and *Dolphin* v. *Starr*, 130 F. 2d 868. As petitioner contends, the decision herein as well as those decisions conflict with the decisions of the Circuit Court of Appeals for the Sixth Circuit in *Jarvis* v. *Shackelton*, 136 F. 2d 116; *Varney* v. *Warehime*, 147 F. 2d 238, certiorari denied, 325 U. S. 882, and *Greer* v. *Cline*, 148 F. 2d 380.[a] They also probably conflict with the decisions of the Fifth Circuit in *Rood* v. *Goodman*, 83 F. 2d 28, certiorari denied, 299 U. S. 551; *Ryan* v. *Amazon Petroleum Corp.*, 71 F. 2d 1, reversed

[a] *Pinkus* v. *Walker*, 61 F. Supp. 610 (D. N. J.), with which petitioner also claims the instant decision conflicts, itself conflicts with *Scientific Mfg. Co.* v. *Walker*, 40 F. Supp. 465 (M. D. Pa.) which also is in the Third Circuit. Although the Circuit Court of Appeals for the Third Circuit has not passed on the narrow question of whether the Postmaster General is an indispensable party to a suit to vacate a fraud order, it has held that a superior official is an indispensable party to a proceeding to enjoin his subordinate from obeying his orders. *Chamberlain* v. *Lembeck*, 18 F. 2d 408 (C. C. A. 3); *Doran* v. *Charles Kaier Co.*, 60 F. 2d 259 (C. C. A. 3).

on other grounds, 293 U. S. 388; and *Yarnell* v. *Hillsborough Packing Co.*, 70 F. 2d 435. On the other hand, the decisions of the Ninth Circuit accord with those of various other circuits (*National Conference on Legalizing Lotteries, Inc.* v. *Goldman*, 85 F. 2d 66 (C. C. A. 2); *Chamberlain* v. *Lembeck*, 18 F. 2d 408 (C. C. A. 3); *Doran* v. *Charles D. Kaier Co.*, 60 F. 2d 259 (C. C. A. 3); *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97 (C. C. A. 4); *Jump* v. *Ellis*, 100 F. 2d 130 (C. C. A. 10), certiorari denied, 306 U. S. 645) and is supported by the decisions of this Court in such cases as *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28; *Guerich* v. *Rutter*, 265 U. S. 388, and *Webster* v. *Fall*, 266 U. S. 507. Although the later decision of this Court in *Colorado* v. *Toll*, 268 U. S. 228, has been variously interpreted in the lower federal courts as limiting or overruling those decisions, no necessity exists in this case to determine their applicability or to resolve these conflicts among the various circuit courts of appeal.

This is true because the result in the instant case can be clearly supported on the independent ground that the complaint fails to state a cause of action. In *Brooks* v. *Dewar*, 313 U. S. 354, which arose on demurrer to a bill to enjoin a subordinate of the Secretary of the Interior, it was contended that the Secretary was an indispensable party.

However, this Court declined to pass upon this and related questions, saying (313 U. S. 359–360):

> We are not disposed to attempt a critique of the authorities. Since the jurisdiction and the procedure of the court below are sustained by decisions of this Court, we are unwilling to base our judgment upon a resolution of asserted conflict touching issues of so grave consequence, where, as here, the bill fails to make a case upon the merits.

The instant case presents a parallel situation, except that here there is no occasion for this Court to grant certiorari even for purpose of determining whether the complaint states a cause of action (see Brief for Respondent in Opposition in *Neher* v. *Harwood*, No. 292, October Term, 1942), since, contrary to the holding of the district court, the transcript of the proceedings before the Post Office Department, which was attached to the complaint as Exhibit A, plainly shows that the order of the Postmaster General is supported by substantial evidence.[1]

2. Petitioners (see e. g. Pet. 19–28, 28–36) attack the sufficiency of the evidence supporting the fraud order here involved solely on the basis

[1] We do not understand petitioners to contend that the fraud order of the Postmaster General may be set aside if it is supported by substantial evidence; in any event, it is settled law that it may not be set aside in such circumstances. *Leach* v. *Carlile*, 258 U. S. 138; *Farley* v. *Simmons*, 99 F. 2d 343 (App. D. C.), certiorari denied, 305 U. S. 651.

that, as they claim, the testimony of the Post Office Department's expert witness is opinion evidence of the character which this Court in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, held was not adequate to sustain a fraud order issued by the Postmaster General. The District Court's holding that the fraud order was not supported by substantial evidence was based on the same reasoning (R. 272–273). The opinion testimony, however, rejected in the *McAnnulty* case was addressed to the claim that "the mind of the human race is largely responsible for its ills * * * and that [it] does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to * * *" (187 U. S. at 103).*

The opinion evidence in the *McAnnulty* case related to a field of knowledge where there was a

---

* In regard to such opinion testimony, this Court said: "How far these claims are borne out by actual experience may be matter of opinion. Just exactly to what extent the mental condition affects the body, no one can accurately and definitely say. * * * Even intelligent people may and indeed do differ among themselves as to the extent of this mental effect. * * * The claim of the ability to cure may be vastly greater than most men would be ready to admit, and yet those who might deny the existence or virtue of the remedy would only differ in opinion from those who assert it. There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; * * * (187 U. S. at 104).

sharp division of opinion among those learned in the field and where there were no fixed guideposts which were generally accepted. That case is consequently inapplicable where the opinion testimony involved was based on scientific facts which have become generally accepted through advance of medical knowledge. *Farley* v. *Heininger,* 105 F. 2d 79, 84 (App. D. C.), certiorari denied, 308 U. S. 587; *Aycock* v. *O'Brien,* 28 F. 2d 817 (C. C. A. 9); *Randle* v. *United States,* 113 F. 2d 945, 949 (App. D. C.), certiorari denied, 311 U. S. 683; *Procter & Gamble Co.* v. *Federal Trade Commission,* 11 F. 2d 47 (C. C. A. 6), certiorari denied, 273 U. S. 717; *Raladam Co.* v. *Federal Trade Commission,* 42 F. 2d 430, 435 (C. C. A. 6), affirmed, 283 U. S. 643; *Elliott Works* v. *Frisk,* 58 F. 2d 820, 822–823 (D. C. S. D. Iowa); cf. *Farley* v. *Simmons,* 99 F. 2d 343, 347 (App. D. C.), certiorari denied, 305 U. S. 651; *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission,* 143 F. 2d 676, 678–679 (C. C. A. 2).

Here, the question concerned petitioners' claims as to their scheme for reducing as to which there is very little division in scientific opinion (R. 135). The causes of obesity are well known as are the problems and difficulties of weight reducing. Petitioners' representation to the effect that all persons could safely follow their scheme (R. 68, 71, 73), which petitioners claimed did not involve canary or starvation diets (R. 59, 60, 61,

70), were shown to be false by testimony, which although commonly catagorized as "opinion" was actually expressing conclusions based on the application of well-known and accepted scientific knowledge to undisputed facts. For example, the fact that the diet here involved was a strict low calorie diet was determined from the caloric value of the food included in the diet and of the tablets (R. 121–123) which contained only two calories (R. 123); and the testimony that the tablets alone would not eliminate hunger pains was based on medically accepted causes of hunger and their elimination (R. 127, 152). In addition, the testimony that some people could not, because of the state of their health, safely lose weight rapidly, or even gradually, under petitioners' or any other scheme of dieting is based on accepted medical knowledge (R. 109–137). As a matter of fact, the testimony of petitioner Al Williams accords therewith since, although he claimed to be in good health and physical condition (R. 161, 183, 184), he admitted on cross-examination that he would become sick if he attempted to reduce from his then weight of 220 to 230 pounds down to 185 pounds, the average weight for men his size (R. 184), a loss of weight of about 40 pounds, which petitioners' circular represented could be achieved with safety under their scheme (R. 117, 119). The only reason he suggested that obese persons following the plan would not be made ill by the loss of weight was

that "they can't go beyond their own limitations" (R. 185). Similarly, the testimony that the cream would not have the effect represented was likewise based on the known actions of its ingredients (R. 93, 133, 134). In light of these considerations, we submit that the opinion testimony of the medical expert, being based on accepted scientific facts, was not the type of opinion evidence condemned in the *McAnnulty* case and clearly was sufficient to support the fraud order here involved.

Moreover, petitioners represented that because of the tablet feature of their plan, any obese person, regardless of age, could lose weight safely and easily irrespective of his success or failure with other plans (R. 68), whereas the testimony showed that it was no different from any other strict low calorie diet plan and that it was subject to all the difficulties inherent in such a diet. Accordingly, as in *Leach* v. *Carlile*, 258 U. S. 138, the *McAnnulty* case, regardless of its scope, is here inapplicable, since the plan "was so far from being the panacea which [they were] advertising it through the mails to be, that by so advertising it [they were] perpetrating a fraud upon the public." 258 U. S. at 139.*

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* Petitioners' implied claim (Pet. 27) that they were denied a full hearing by virtue of the denial of their motion to reopen the case in order to take depositions of medical witnesses is obviously unsound, since they were notified at the outset of the hearing that the practice was not to hear cases piecemeal and that if for any reason they wished to apply for a

CONCLUSION

While the decision below is in conflict with the opinions of other Circuit Courts of Appeal on the indispensable party question, there is no need here to resolve the conflict since the decision can be sustained on the independent ground that the complaint failed to state a cause of action, the fraud order being supported by substantial evidence. The petition should therefore be denied.

Respectfully submitted.

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APRIL 1947.

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continuance of the hearing, they should accordingly so move at that time (R. 48). No such motion was made and the hearing proceeded (R. 49).

APPENDIX

R. S. 3929 (39 U. S. C. 259) provides, in part, as follows:

> The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. * * *

R. S. 4041 (39 U. S. C. 732) provides, in part, as follows:

> The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders.
>
> This shall not authorize any person to open any letter not addressed to himself.

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No. 47

In the Supreme Court of the United States

OCTOBER TERM, 1947

AL WILLIAMS AND AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., A CORPORATION, PETITIONERS

v.

MICHAEL J. FANNING, INDIVIDUALLY AND AS POSTMASTER OF THE CITY OF LOS ANGELES, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM 1947

No. 47

AL WILLIAMS AND AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., A CORPORATION, PETITIONERS

v.

MICHAEL J. FANNING, INDIVIDUALLY AND AS POSTMASTER OF THE CITY OF LOS ANGELES, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California, Central Division (R. 271–275) is not reported. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 286) is reported at 158 F. 2d 95.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 6, 1946 (R. 287). The

petition for a writ of certiorari was filed March 1, 1947, and was granted on April 14, 1947, limited to the first question presented by the petition (R. 289). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Postmaster General is an indispensable party to an action to restrain a local postmaster from carrying into effect a postal fraud order issued by the Postmaster General, and to vacate such order and declare it void.

STATUTES AND RULES OF CIVIL PROCEDURE INVOLVED

1. R. S. 3929, as amended (39 U. S. C. 259) provides in pertinent part:

> The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or

company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. * * *

R. S. 4041, as amended (39 U. S. C. 732) provides in pertinent part:

The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as

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a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders.

This shall not authorize any person to open any letter not addressed to himself.

2. Rules 12 (b), 12 (h), and 19 (b) of the Federal Rules of Civil Procedure are as follows [1947 amendments are in italics]:

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

* * * * *

(b) *How Presented.*—Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) *failure to join an indispensable party.* A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. *If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

* * * * *

(h) *Waiver of Defenses.*—A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, *the defense of failure to join an indispensable party,* and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense,

if made at the trial, shall be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received.

* * * * *

Rule 19. Necessary Joinder of Parties.

* * * * *

(b) *Effect of Failure to Join.*—When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

STATEMENT

Petitioners herein are Al Williams who conducts various "weight reducing" enterprises in Los Angeles, California, and the Al Williams Health System of Los Angeles, Inc., a corporation

which alleges that it neither had nor has any interest or participation in any reducing plan or program conducted through the use of the mails (R. 233–234). The corporation was neither named nor did it participate in any of the fraud order proceedings hereinafter discussed.

On May 25, 1945, the Post Office Department furnished petitioner Al Williams with a memorandum charging him and variously named enterprises which he owned and operated (R. 235) with violations of the postal fraud statutes in connection with sales through the mails of tablets called "Foods That Take Hunger Away" together with "Al Williams (weight) Reducing Plan" and a "Special Body Massage Creme," and ordered them to show cause why a fraud order should not issue (R. 45, 236). An answer was filed denying the charges (R. 52–56). A hearing was held at Washington, D. C., on June 20, 1945, at which petitioner Williams appeared and was represented by counsel (R. 44).

At the close of the hearing, Williams was furnished a copy of the transcript of the hearing (R. 227). He subsequently moved to reopen the case for the reception of additional testimony to be taken by deposition in Los Angeles, California (R. 228, 260–264). This motion was denied (R. 228, 264). Thereafter, Williams moved that "all possible scientific tests be made and obtained by the Post Office Department to determine the efficacy of the tablets sold by [petitioners] for

the elimination or prevention of hunger when used in connection with the reducing plan" (R. 228). This motion was also denied (R. 228).

The Solicitor of the Post Office Department made findings of fact based primarily on the testimony of a physician who has specialized in obesity, its causes and treatment, and recommended that a fraud order be issued (R. 219–228). The physician had testified in substance that, contrary to petitioner's representations (R. 59–61, 69, 70), the challenged diet was a "strict low calorie diet" (R. 121) and that such a diet would be harmful and dangerous to many obese persons if followed without proper medical supervision (R. 110, 116–119, 128, 137), which he testified petitioner's plan did not offer (R. 115–116). Thereafter on December 10, 1945, the Acting Postmaster General issued an order in the usual form addressed to the postmaster at Los Angeles, California, forbidding him to pay any money order drawn to the order of Al Williams; Al Williams, Health Conditioner; Al Williams, Physical Conditioner; Al Williams Health System; The Al Williams Health System, and Williams Health System. The order also directed him to inform the remitter of such money order that payment had been forbidden, and to return all letters so addressed with the word "Fraudulent" written or stamped upon the outside thereof (R. 257–258). Respondent received a copy of this order on December 12, 1945 (R. 258).

On January 7, 1946, petitioners filed in the United States District Court for the Southern District of California, Central Division, a complaint against respondent, "Individually and as Postmaster of the City of Los Angeles, California."[1] Petitioners alleged that they were informed that pursuant to the fraud order and only by reason thereof, respondent since December 12, 1945, had stamped and returned, in accordance with the fraud order, all mail addressed to petitioner Al Williams and the other parties named in the fraud order (R. 266). It was further alleged on information and belief that although petitioner, Al Williams Health System of Los Angeles, Inc., a corporation, is not named in the fraud order, respondent would continue so to dispose of all of petitioners' mail addressed to them, to the designations enumerated in the order or to any designation by which petitioners might be known (R. 267). Claiming that because of the deprivation of a full and impartial hearing, petitioners' rights had been grossly violated (R. 260, 264), and that in addition the fraud order, being "unsupported by any substantial evidence in fact", was "issued without and beyond the authority and jurisdiction of the Postmaster General, and

[1] Jurisdiction was invoked under Section 24 (6) of the Judicial Code (28 U. S. C. 41 (6)). (R. 2, 231.)

The complaint was subsequently amended to eliminate the constitutional questions raised in the original complaint. (Compare R. 231–270 with R. 1–43; see Pet. 3, 17.)

of said Post Office Department, and beyond the authority conferred upon them by the Acts of Congress" (R. 259), the complaint prayed that the order be vacated and decreed to be void; that respondent be enjoined from carrying out the order and that he be directed to proceed and continue with the regular delivery of all mail addressed to petitioners and the other names designated in the order (R. 269).[2] Respondent moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted (R. 229).

The district court held that since the Postmaster General had not been joined as a party, it was bound to dismiss the complaint under *Neher* v. *Harwood*, 128 F. 2d 846, certiorari denied, 317 U. S. 659, where the Circuit Court of Appeals for the Ninth Circuit had held that in such proceedings the Postmaster General was an indispensable party (R. 274–275, 276). On appeal, the court below affirmed *per curiam* upon the authority of the cited case (R. 286). The substantive question is not now before this Court (R. 289).

SUMMARY OF ARGUMENT

A. Under the decisions of this Court (*Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28; *Gnerich*

[2] Copies of the transcript of the proceedings (R. 44–218) and of the "Memorandum for the Postmaster General Embodying a Finding of Fact and Recommending the Issuance of a Fraud Order" (R. 219–228) were filed with the complaint as Exhibits A and B, respectively.

v. *Rutter*, 265 U. S. 388; *Webster* v. *Fall*, 266 U. S. 507) which antedated *Colorado* v. *Toll*, 268 U. S. 228, the Postmaster General would be an indispensable party to a suit to restrain the carrying out of a postal fraud order and such an action would unquestionably have been dismissed in his absence if the infirmity had been called to the Court's attention. The relief sought in such a proceeding is against the action taken by the Postmaster General, and not the local postmaster, such as respondent here, for under the applicable statutes the order could only have been issued by the Postmaster General "upon evidence satisfactory to him." The Postmaster General is the public's real representative in the proceeding; it is his hands which would be tied if the injunction prayed by petitioners were to issue. Plainly then the Postmaster General has an interest which would be affected by the issuance of the injunction. He is therefore an indispensable party in whose absence the proceeding may not be maintained. The only basis for even proceeding against local postmasters stems from the fact that fraud orders are couched in terms requiring local postmasters to take action. But the local postmasters act merely as agents of the Postmaster General; they have neither power nor discretion in the matter.

Considerable uncertainty as to whether the superior is an indispensable party to an action against the subordinate has resulted from this

Court's decision in *Colorado* v. *Toll*, 268 U. S. 228, where it was held that an action to enjoin enforcement of the superior officer's regulation could proceed against a subordinate in the absence of the superior. This Court has however subsequently indicated that the rule stated in its prior decisions is still valid.

The majority of the circuit courts of appeals have held that the *Warner Valley*, *Gnerich* and *Webster* cases were not overruled by *Colorado* v. *Toll*, and have tended to follow the former line of cases, endeavoring to find some basis for distinction between the decisions. Some courts distinguish the *Toll* case on the ground that it involved a proceeding brought by a State. Some hold that where the act complained of exceeds the subordinate's constitutional or statutory power the superior need not be joined, but that he is an indispensable party if the action attacks an exercise of discretion within the scope of his statutory authority. Other courts hold that where the subordinate has merely carried out the superior's order the latter must be joined, and that the subordinate may be sued alone only where he has deviated from the terms of the order so that the acts complained of are in fact his own. Still others hold that the question of the superior's indispensability is to be determined on considerations of the plaintiff's convenience, i. e., that it is burdensome to force him to bring his action against the superior officer at the seat of government.

B. If the suggested distinctions resting on reconciliations or rationalization of the two lines of authority in this Court have any validity, then the Postmaster General, who alone has power to issue a fraud order, is an indispensable party to any proceeding to enjoin the enforcement of such an order or to set it aside. But the basic difficulty with the attempted reconcilations is that the cases in this Court, fairly read, cannot be reconciled.

The balance of convenience rule does not answer the problem either. To begin with, the rule as to indispensable parties, which comes close to being jurisdictional and which is based upon "the plainest principles of justice", is not one which can be waived in the exercise of the chancellor's discretion. Moreover, the considerations of convenience are not all on the plaintiff's side. There is a public interest involved, which, regardless of the validity or otherwise of the particular official act under consideration, is prejudiced by inadequate or uninformed representation of public officers. Where, as in postal matters, administration is centralized, the quality of the defense is adversely affected by permitting suit to proceed against the distant subordinate, because of the time factor and because the defending attorney is hampered in his access to the facts and out of touch with his real client. The corresponding inconvenience occasioned a plaintiff required to sue in the District of Columbia does not affect the

presentation of his case, and is moreover an inescapable consequence of the fact that ours is a vast country with only a single capital. In view of the circumstance that the plaintiff must defend the charge of postal fraud at a hearing in Washington, it cannot be deemed an unusual inconvenience to require him to sue in Washington if he later feels himself aggrieved by the result of that hearing. The statute book is full of instances where, on the one hand, Congress has prescribed centralized judicial review of administrative action, and, on the other, has provided for decentralized review. In the class of cases here under consideration it is not for the courts, by introducing concepts of convenience which Congress had not seen fit to write into the postal statutes, to permit a fraud order issued by the Postmaster General to be set aside in his absence.

C. So far as the present cause is concerned, the judgment below can be supported on most of the distinctions made in respect of the cases decided by this Court. But that would not settle the law. If there is to be certainty and a workable rule in the future, one or the other of the applicable decisions must yield.

The *Warner Valley-Gnerich-Fall* line of cases is consistent with accepted equitable rules regarding indispensable parties; it is consistent with the Federal Rules of Civil Procedure; and it is consistent with decisions dealing with indispensable parties in litigation against defendants not hold-

ing public office. *Colorado* v. *Toll*, on the other hand, is inconsistent at each of these points. There is, moreover, every reason why a public officer should have the same right as a private defendant to hearing and notice before his acts are enjoined or set at naught.

We think the true rule is that an action seeking equitable relief can proceed in the superior's absence only when the subordinate's authority, within the statute and within the directions given by his superior, is sufficient to grant the relief sought, but that, where all power and all discretion are vested in the superior, and where the order or decision attacked has been made by the superior, then he is an indispensable party, and relief cannot be given in his absence.

This rule is consistent with established equitable principles, it is workable, and it does not break down in verbal distinctions. Its foundation would involve the end of *Colorado* v. *Toll*, 268 U. S. 228, but there is respectable precedent for such disposition of "a departure" which was "a source of embarrassment and confusion in other courts", and which "on further consideration we feel constrained to pronounce * * * essentially unsound." *Lee* v. *Chesapeake & Ohio Ry.*, 260 U. S. 653, overruling *Ex parte Wisner*, 203 U. S. 449. Courts and litigants alike would profit from the resultant certainty, and Congress would still be free to provide for decentralized judicial review whenever it deemed such a step to be in the public interest.

ARGUMENT

THE POSTMASTER GENERAL IS AN INDISPENSABLE PARTY TO AN ACTION BROUGHT TO RESTRAIN THE ENFORCEMENT OF A POSTAL FRAUD ORDER OR TO VACATE SUCH AN ORDER AND DECLARE IT VOID; AND THE ACTION MAY NOT BE MAINTAINED IN HIS ABSENCE

The narrow question presented by this case, whether the Postmaster General is an indispensable party to an action brought against a local postmaster to restrain the carrying out of a postal fraud order issued by the Postmaster General and to vacate such an order on the ground that it is void, is one aspect of the general question whether and in what circumstances a superior officer of the United States is an indispensable party to a proceeding brought to enjoin a subordinate.

The postal fraud statutes (R. S. 3939, 4041, *supra*, pp. 2–4) provide that fraud orders are to be issued by the Postmaster General, and that they may be issued only "upon evidence satisfactory to him." There is nothing in these statutes authorizing the Postmaster General to delegate this discretion to local postmasters or to anybody else, and the orders are in fact issued by the Postmaster General and are signed by him. The hearing which precedes the issuance of such an order is held in Washington, and the Post Office Department has neither procedure for testimony by depositions nor any power to subpoena witnesses. See *Administrative Procedure in Gov-*

ernment Agencies: Post Office Department, Sen. Doc. 186, 76th Cong., 3d sess., Part 12, pp. 15–38. The statutes which authorize the issuance of fraud orders do not provide for any judicial review of such orders. The judicial review which may be obtained is based exclusively upon the right of the courts to enjoin an illegal withholding of mail by the Postmaster General. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 109.

The local postmaster is only the ministerial arm of the Postmaster General in carrying out the fraud order; he has no knowledge as to the basis of the order; no discretion is reposed in him either as to the issuance or the enforcement of the fraud order; and since the Postmaster General, his superior, has unquestioned power to issue the orders, once the order is issued the local postmaster has no choice but to execute the fraud order in accordance with its terms. The power, responsibility and discretion in regard to the issuance of fraud orders is vested in the Postmaster General, and hence, it is he who is the public's real representative in the matter. It is his hands which would be tied if the injunction prayed by petitioners were to issue. In these circumstances, we submit that the presence of the Postmaster General is indispensable to an action attacking the validity of a fraud order issued by him such as that here involved, and that his absence is fatal to maintenance of the proceeding.

Although this Court has never passed on the specific question whether the Postmaster General is an indispensable party to a suit to restrain the carrying out of a postal fraud order, an examination of the decisions of this Court in regard to the general question whether a superior officer was an indispensable party to a suit brought against his subordinate indicates that prior to *Colorado* v. *Toll*, 268 U. S. 228, suits to restrain the carrying out of postal fraud orders would unquestionably have been dismissed in the absence of the Postmaster General if that infirmity had been called to the Court's attention. Since *Colorado* v. *Toll*, however, the law has been in a state of uncertainty, as the attempts of the several circuit courts of appeals to resolve the decisions show. In *Brooks* v. *Dewar*, 313 U. S. 354, this Court declined to pass upon the question of the superior's indispensability as a party and other questions related thereto, saying (313 U. S. at 359–360),

> We are not disposed to attempt a critique of the authorities. Since the jurisdiction and the procedure of the court below are sustained by decisions of this Court, we are unwilling to base our judgment upon a resolution of asserted conflict touching issues of so grave consequence, where, as here, the bill fails to make a case upon the merits.

Now, however, the question is squarely raised.

We propose at the outset to state the cases decided by this Court, and then to set out the state of the law in the various circuits. Next, we analyze all the decisions in an attempt to ascertain whether a workable rationale, which turns on substance and not on accidents of pleading, can be extracted from the authorities. Finally, we submit what we believe to be a sound and practical rule of decision for this and similar cases involving prayers for equitable relief.

A. THE DECIDED CASES

(1) *Decisions of this Court*

The first case in which this Court considered the question was *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28. There the bill sought to enjoin the then Secretary of the Interior and the Commissioner of the General Land Office, and their subordinates, from "assuming to exercise further jurisdiction with respect to the disposition of" certain lands and from "further trespassing upon [plaintiff's] right of quiet possession thereof." It further prayed that the then Secretary of the Interior be directed to issue patents for these lands to plaintiff. While the case was on appeal to this Court, the Secretary of the Interior resigned, so that as to him the suit abated. At that time, there was no way to

bring his successor into the suit. This Court held that the suit could not proceed against the Commissioner alone, saying (pp. 34–35):

> The purpose of the bill was to control the action of the Secretary of the Interior; the principal relief sought was against him; and the relief asked against the Commissioner of the General Land Office was only incidental, and by way of restraining him from executing the orders of his official head. To maintain such a bill against the subordinate officer alone, without joining his superior, whose acts are alleged to have been unlawful, would be contrary to settled rules of equity pleading. Calvert on Parties, (2d ed.) bk. 3, c. 13.

In so holding this Court cited the decision of Lord Chancellor Hardwicke in *Vernon* v. *Blackerby*, 2 Atk. 144, 146, s. c. Barnardiston Ch. 377, dismissing as preposterous a bill against a subordinate praying that he distribute funds which Parliament had placed in the control of his superiors.

The same question arose in *Gnerich* v. *Rutter*, 265 U. S. 388, decided in June 1924. There the plaintiffs claimed that the limitation as to their sales of liquor in the permit issued them as licensed pharmacists under the National Prohibition Act was void and beyond authority vested in the prohibition commissioner by the pertinent regulations. The Commissioner of Internal Revenue was responsible for the administration of that Act. He had, as authorized by the Act, issued regulations which provided for and designated a

prohibition commissioner as his general agent to issue and sign permits to sell liquor at retail, and which also provided for local prohibition directors to issue and sign permits to purchase liquor for use and sale under the permits last mentioned. Plaintiffs' permit to sell liquor had been issued and signed by the prohibition commissioner, who in the exercise of the discretion vested in him by the regulations had imposed the condition complained of. Plaintiffs brought suit against the local prohibition director, who had refused to issue to them permits to purchase in excess of this limitation, seeking to restrain him from giving effect to the limitation. Although the Commissioner of Internal Revenue had delegated his authority and discretion to issue permits to the prohibition commissioner and prohibition directors and the permit in question had been issued by the prohibition commissioner, who had imposed the limitation within the scope of the discretion delegated him, the Court, quoting *Warner Valley* v. *Smith, supra,* held that the Commissioner of Internal Revenue was an indispensable party to the proceeding. Mr. Justice Van Devanter said (265 U. S. at 391–392):

> The act and the regulations make it plain that the prohibition commissioner and the prohibition director are mere agents and subordinates of the Commissioner of Internal Revenue. They act under his direction and perform such acts only as he commits to them by the regulations. They are

> responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given opportunity to defend his direction and regulations.

At the next Term the question of whether the superior officer is an indispensable party to a suit against his subordinate was again raised in *Webster* v. *Fall*, 266 U. S. 507, decided in January 1925. There, an incompetent Osage Indian claimed that he was entitled to payments under the Act of March 3, 1921, c. 120, 41 Stat. 1249, 1250. That Act required the Secretary of the Interior to cause to be paid $1000 quarterly to such Osage Indians, payments to be made under the supervision of the Superintendent of the Osage Agency. But payment was withheld from plaintiff under the authority of R. S. 2087.[3] Plaintiff in his bill for mandatory injunction to compel payment of the money alleged that in so far as he was concerned R. S. 2087 and all orders,

[3] This section (25 U. S. C. 130) provides in part: "No annuities, or moneys, or goods, shall be paid or distributed to Indians while they are under the influence of any description of intoxicating liquor, nor while there are good and sufficient reasons leading the officers or agents, whose duty it may be to make such payments or distribution, to believe that there is any species of intoxicating liquor within convenient reach of the Indians * * *."

rules or regulations issued thereunder by the Secretary of Interior were unconstitutional. The Secretary of Interior was named as a party to the suit but no service was made upon him and he did not appear. This Court held on the authority of the *Gnerich* and *Warner Valley* cases that "the suit was one which required the presence of the Secretary, and the bill should have been dismissed for want of a necessary party." (266 U. S. at 510.) Quoting the language from *Gnerich* v. *Rutter*, set out *supra*, pp. 21–22, the Court said (266 U. S. at 510):

> The statutory direction to cause quarterly payments to be made (subject to § 2087) is addressed to the Secretary. The power and responsibility are his. Neither Wright nor Wise has any primary authority in the matter. They can act only under, and in virtue of, the Secretary's general or special direction. In the absence of it no payments or disbursements properly can be made. Authority in the Superintendent to supervise such payments is not authority to cause them to be made.

The Court refused to give any weight to the cases cited by petitioner where, although the suit had been brought against subordinate officials without joining the superior, the cause had been determined on the merits,[4] since "in none of them

[4] E. g., *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Swigart* v. *Baker*, 229 U. S. 187; *Hill* v. *Wallace*, 259 U. S. 44, cited for the petitioner, 266 U. S. at 508.

was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (266 U. S. at 511.)

However, in May 1925, less than five months later and at the same Term, the Court held in *Colorado* v. *Toll*, 268 U. S. 228, that the action there brought could be maintained without the superior officer. That case involved a bill by the State of Colorado to enjoin the Superintendent of the Rocky Mountain National Park from enforcing certain regulations for the government of the park, which were alleged to be beyond the authority conferred by Congress and to interfere with the sovereign rights of the state over the park roads. The statute there involved (Act of January 26, 1915, c. 19, 38 Stat. 798) put the park under the control of the Secretary of Interior and made it his duty to make reasonable regulations for its management. The brief for the Superintendent had urged *inter alia* that the bill should be dismissed for failure to join the Secretary of Interior, citing the *Warner Valley*, *Gnerich* and *Webster* cases. Br. for Appellee, No. 234, Oct. T. 1924, at 12–13. The Court, with-

out referring to any of these cases, held instead (268 U. S. at 230):

> The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States. *Missouri* v. *Holland*, 252 U. S. 416, 431. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619, 620.[5]

Apart from passing over the question in *Brooks* v. *Dewar*, 313 U. S. 354, see p. 18, *supra*, this Court has, since the decision in *Colorado* v. *Toll*, expressly adverted to the question of indispensability of a superior officer only once, *Miguel* v. *McCarl*, 291 U. S. 442, and there it indicated that it considered the *Warner Valley*, *Gnerich* and *Webster* cases as uninfringed by *Colorado* v. *Toll*. In the *Miguel* case suit was brought against, *inter alia*, the Chief of Finance of the Army for an injunction directing him to disburse

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[5] We discuss below, pp. 38–39, 42–43, the significance of the authorities relied upon. It may be noted at this juncture, however, that in *Missouri* v. *Holland*, a suit against a subordinate, the question of the indispensability *vel non* of the superior was not raised; and in *Philadelphia Co.* v. *Stimson* the suit was brought against the superior—the Secretary of War—and the only question was whether in the circumstances it was a suit against the United States.

retired pay to a Philippine Scout. This Court in discussing the propriety of the requested relief stated (291 U. S. at 455):

> The Chief of Finance is charged by law with the duty of disbursing all funds of the War Department, including the pay of the army. U. S. C., Title 10, § 172. The disbursing officer to whom the voucher was presented for payment, therefore, is simply a subordinate of the Chief of Finance, subject to his control and direction, and the suit was properly brought against the latter. The purpose of the suit was to control the action of the Chief of Finance, that is, to compel him to pay or cause to be paid the voucher in question. The disbursing officer as the mere agent of his superior officer is not an indispensable, although he might have been joined as a proper party. Compare *Warner Valley Stock Co.* v. *Smith, supra,* pp. 34–35; *Gnerich* v. *Rutter,* 265 U. S. 388, 391–393; *Webster* v. *Fall,* 266 U. S. 507; *Alcohol Warehouse Corp.* v. *Canfield,* 11 F. 2d 214; *Dami* v. *Canfield,* 5 F. 2d 533.

(2) Decisions in the several circuits

In all of the circuit courts of appeals which have considered the present question, save one—the Sixth Circuit, as to which see *infra,* pp. 33–34—the decisions have resolved themselves into consideration of the effect of *Colorado* v. *Toll* on the three earlier cases in this Court. The problem for the lower federal courts has largely been one

of attempting to reconcile the result and the reasoning in the *Toll* case with the result and the reasoning in the *Warner Valley, Gnerich,* and *Fall* cases.

a: The majority of the circuit courts of appeals have followed the *Gnerich* v. *Rutter* line of authority in preference to the *Colorado* v. *Toll* apparent departure therefrom; but, as will be seen, uncertainty has developed even among these courts in consequence of their efforts to harmonize the decisions of this Court and to find a rational basis for distinction between them. The Circuit Courts of Appeals for the Second Circuit, the Third Circuit, and the Tenth Circuit have held that *Gnerich* v. *Rutter* is unaffected by *Colorado* v. *Toll*. *National Conference on Legalizing Lotteries, Inc.* v. *Goldman,* 85 F. 2d 66 (C. C. A. 2) (suit to enjoin enforcement of postal fraud order can not be maintained in absence of Postmaster General); *Alcohol Warehouse Corp.* v. *Canfield,* 11 F. 2d 214 (C. C. A. 2); *Reichle* v. *Federal Reserve Bank,* 34 F. 2d 910, 916 (C. C. A. 2); *Jewel Productions Inc.* v. *Morgenthau,* 100 F. 2d 390 (C. C. A. 2); *Chamberlain* v. *Lembeck,* 18 F. 2d 408 (C. C. A. 3); *Doran* v. *Charles D. Kaier Co.,* 60 F. 2d 259 (C. C. A. 3); *Jump* v. *Ellis,* 100 F. 2d 130, 135 (C. C. A. 10), certiorari denied, 306 U. S. 645.

The Second Circuit has suggested that *Colorado* v. *Toll* might be distinguishable since it involved the quasi-sovereign rights of a state. Support for

this view can be found in the Court's language in that case (268 U. S. at 230) and in its citation there of *Missouri* v. *Holland*, 262 U. S. 416, 431. See *National Conference on Legalizing Lotteries, Inc.* v *Goldman*, 85 F. 2d 66 (C. C. A. 2); cf. *Carr* v. *Desjardines*, 16 F. Supp. 346, 349 (W. D. Okla.). Under that distinction, of course, *Colorado* v. *Toll* does not affect the postal fraud order cases, all of which are brought by individuals; those cases cannot proceed in the absence of the Postmaster General, and the Second Circuit so held in the *Lotteries* case, *supra*; see also *Smith* v. *Farley*, 38 F. Supp. 1012 (S. D. N. Y.). Moreover, the Second Circuit holds the Postmaster General to be an indispensable party, not only in fraud order cases, but also in other situations involving the business of the Post Office Department. *Transcontinental and Western Air* v. *Farley*, 71 F. 2d 288 (C. C. A. 2), certiorari denied, 293 U. S. 603 (annulment of air mail contracts); *Viking Press* v. *Goldman*, 38 F. Supp. 1014 (S. D. N. Y.) (classification of mail matter for rate purposes); *Hardy* v. *Goldman*, 38 F. Supp. 1011 (S. D. N. Y.) (exclusion of matter from the mails).

b. The Circuit Court of Appeals for the Ninth Circuit and perhaps that for the Fourth Circuit follow *Gnerich* v. *Rutter* and *Webster* v. *Fall* in cases such as the instant one, where the discretion of the superior appears to be involved. *Neher* v. *Harwood*, 128 F. 2d 846 (C. C. A. 9), certiorari

denied, 317 U. S. 659 (Postmaster General indispensable party to suit to enjoin postal fraud order); *Dolphin* v. *Starr*, 130 F. 2d 868 (C. C. A. 9) (postal fraud order suit); *Moore* v. *Anderson*, 68 F. 2d 191 (C. C. A. 9), certiorari denied, 293 U. S. 567; *Moody* v. *Johnston*, 66 F. 2d 999 (C. C. A. 9); *Appalachian Elec. Power Co.* v. *Smith*, 67 F. 2d 451 (C. C. A. 4), certiorari denied, 291 U. S. 674; *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97 (C. C. A. 4); see *Blair* v. *McAlhaney*, 123 F. 2d 142 (C. C. A. 4). But these courts follow *Colorado* v. *Toll* where the plaintiff alleges a total lack of statutory authority in the defendant officer. *Berdie* v. *Kurtz*, 75 F. 2d 898 (C. C. A. 9); *Darger* v. *Hill*, 76 F. 2d 198 (C. C. A. 9); cf. *Ferris* v. *Wilbur*, 27 F. 2d 262 (C. C. A. 4). This distinction was formulated by the Ninth Circuit in *Neher* v. *Harwood, supra*, after the Second Circuit in the *Lotteries* case had remarked (85 F. 2d at 66) that "the Ninth has decided the point both ways."

c. The position of the Fifth Circuit on this question defies classification. In its first three decisions, that court seemed to hold that *Colorado* v. *Toll* had overruled the *Warner Valley-Gnerich-Fall* line of authority, as it followed the *Toll* case even in situations where the bill attacked the

[6] We discuss below, pp. 40–42, the circumstances that the Ninth Circuit formulated its distinction in consequence of incorrectly reading *Webster* v. *Fall* as not involving the constitutionality of the statute there in question. Compare 128 F. 2d at 849 with 266 U. S. at 509.

exercise of discretionary authority by the absent superior. *Yarnell v. Hillsborough Packing Co.*, 70 F. 2d 435 (C. C. A. 5); *Ryan v. Amazon Petroleum Corporation*, 71 F. 2d 1 (C. C. A. 5), reversed on other grounds, 293 U. S. 388; *Rood* v. *Goodman*, 83 F. 2d 28 (C. C. A. 5), certiorari denied, 299 U. S. 551 (construed as not being a suit to set aside the Postmaster General's fraud order, but as one to enjoin interference with the mail by the local postmaster).[7] The Second Circuit has so read the Fifth's decisions. *Lotteries* case, *supra*, 85 F. 2d at 66. The Ninth Circuit, however, reads two of the Fifth Circuit decisions, *Yarnell* and *Ryan*, as consistent with its own rationalization of this Court's decisions set out in *Neher* v. *Harwood*, 128 F. 2d 846, *supra*, and considers that in the *Rood* case the Fifth Circuit appeared to doubt the correctness of the rule which it was applying.[8] But, in its fourth and

[7] In the case at bar, the complaint seeks both to enjoin the local postmaster's enforcement of the order and also to vacate the order itself (R. 269–270).

[8] Because, as the Ninth Circuit noted, 128 F. 2d at 851, the Fifth Circuit closed its opinion by pointing out that since it was affirming the district court's denial of relief, there would be an end to litigation and no prejudicial harm could come from its holding. 83 F. 2d at 32. The correct procedure in such a case is not to affirm, but to reverse with directions to dismiss for want of a necessary party. *Gnerich* v. *Rutter*, 265 U. S. at 393; *Alcohol Warehouse Corporation* v. *Canfield*, 11 F. 2d 214, 216 (C. C. A. 2).

We discuss below, pp. 46, the circumstance that the Fifth Circuit rested its decision in part on cases which this Court in *Webster* v. *Fall* had held to be not controlling. 83 F. 2d at 31.

latest decision, the Fifth Circuit declined to entertain a suit to enjoin enforcement of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. §§ 206, 207) which was brought solely against a local inspector of the Wage & Hour Administration. *Janes* v. *Lake Wales Citrus Growers Association*, 110 F. 2d 653 (C. C. A. 5). In that case, the Court ignored *Rood* v. *Goodman* and stated: "If [the petitioners] wish a test in equity they ought to go to a jurisdiction where more responsible parties can be found." 110 F. 2d at 654.*

d. No other circuit court of appeals, so far as we are aware, has dealt with the present question in terms of reconciling *Colorado* v. *Toll* with the earlier cases in this Court.

(i) A three-judge district court in the First Circuit followed the *Gnerich* line in *Massachusetts Farmers Defense Committee* v. *United States*, 26 F. Supp. 941 (D. Mass.), which held that the Secretary of Agriculture was an indispensable party in a suit attacking the constitutionality of the Marketing Agreement Act of

*In *Hawthorne* v. *Fisher*, 33 F. Supp. 891 (N. D. Tex.), a three-judge court consisting of Circuit Judge Hutcheson and two district judges held that the Secretary of Agriculture was an indispensable party to an action to enjoin enforcement of the Agricultural Adjustment Act, 7 U. S. C. § 1281 *et seq.*, pointing out that enforcement of the Act is vested exclusively in the Secretary. The Court relied on the *Gnerich* and *Lotteries* cases, stated that *Colorado* v. *Toll* laid down no different rule, and passed over *Rood* v. *Goodman* in silence.

1937, 50 Stat. 246, 7 U. S. C. 601 note, 608 (b) *et seq.*, and seeking to enjoin its enforcement. The District Court for Massachusetts held in *Gargilis* v. *Gleavy*, 45 F. Supp. 721, that the Postmaster General was an indispensable party in an action to enjoin enforcement of a postal fraud order; and, in a decision by another judge, that the Secretary of War was not an indispensable party in an action brought against a subordinate military commander which sought to enjoin an order issued by the subordinate in his own name under a full delegation of authority from the Secretary. *Von Knorr* v. *Miles*, 60 F. Supp. 962, 968, judgment vacated for lack of jurisdiction *sub nom. Von Knorr* v. *Griswold*, 156 F. 2d 287 (C. C. A. 1).

(ii) The District Court for Eastern Wisconsin has advanced another distinction, viz., that the superior is an indispensable party where the subordinate has merely fulfilled the ministerial function of carrying out the superior's order, but not where the proceeding is based on the contention that the subordinate has deviated from the course directed by the superior. *Ernest* v. *Fleissner*, 38 F. Supp. 326. The rationale of this approach is that in the first instance the acts of the subordinate are in fact those of the superior, whereas in the second the deviations are solely the acts of

the subordinate and cannot be imputed to the superior.[10]

e. The Sixth Circuit, alone among the circuit courts of appeals which have struggled with the problem, has refrained from attempting to reconcile the *Warner Valley-Gnerich-Fall* cases with that of *Toll*.

Instead, it has undertaken, initially in a suit to restrain the carrying out of a postal fraud order, to decide whether to dismiss the suit in the absence of the superior, in that case the Postmaster General, ostensibly by balancing the conflicting considerations of convenience of the respective parties as disclosed in the record before it. As a result of such balancing, the court concluded that, although the Postmaster General is clearly an indispenable party as that term is usually defined, dismissal of the suit because of his absence would put the plaintiff to the inconvenience and the substantial, if not prohibitive expense, of bringing a new proceeding in the District of Columbia. This the Sixth Circuit regarded as unjust and inequitable, particularly since the Postmaster General might voluntarily appear locally, and because there is a United States Attorney in every judicial district who

[10] See also *Scientific Mfg. Co.* v. *Walker*, 40 F. Supp. 465 (M. D. Pa.); cf. *Wheeler* v. *Farley*, 7 F. Supp. 433 (S. D. Cal.), appeal dismissed, 293 U. S. 526; *Tribal Council &c* v. *Ickes*, 58 F. Supp. 584 (D. Mont.).

could defend him. Accordingly, it held that the proceeding could be maintained despite the absence of the Postmaster General. *Jarvis* v. *Shackelton Inhaler Co.*, 136 F. 2d 116 (C. C. A. 6); cf. *Varney* v. *Warehime*, 147 F. 2d 238 (C. C. A. 6), certiorari denied, 325 U. S. 882 (suit brought against local agents of War Food Administration to enjoin enforcement of Food Distribution Order No. 79 issued by the War Food Administrator for the regulation of milk handlers allegedly void and beyond statutory power; on merits held not entitled to injunction); *Greer* v. *Cline*, 148 F. 2d 380 (C. C. A. 6) (suit by owners of one tobacco market against local agents of the War Food Administrator to enjoin assignment of additional tobacco inspectors to another market under Tobacco Inspection Act of August 23, 1935, 49 Stat. 731, 7 U. S. C. 511; assignment allegedly arbitrary and capricious, and "wholly void"; on merits held discretionary act not subject to judicial interference)."

B. ANALYSIS OF THE AUTHORITIES

(*1*) *The basic cases in this Court*

By January 1925—and until May of that year—it was clear that the superior was an indis-

[11] See also *Bailey Gaunce Oil & Refining Co.* v. *Duncan*, 10 F. Supp. 280 (W. D. La.) (postal fraud order); *Brotherhood and Union, Etc.* v. *Madden*, 58 F. Supp. 366, 374 (D. Md.), reversed on another ground, 147 F. 2d 439 (C. C. A. 4); Notes, 50 Harv. L. Rev. 796, 801; 37 Col. L. Rev. 140, 142; 50 Yale L. J. 909, 916–917.

pensable party in any suit brought against a subordinate which attacked as invalid on any ground an order issued by the superior; and this was so regardless of whether the relief requested was affirmative (*Warner Valley* v. *Smith*; *Webster* v. *Fall*) or negative (*Gnerich* v. *Rutter*); or whether the plaintiff contended that the statute under which the superior acted was unconstitutional (*Webster* v. *Fall*), or that the superior had exceeded the authority vested in him by a statute (*Warner Valley* v. *Smith*; *Gnerich* v. *Rutter*), or that the superior had abused his discretion within the scope of authority conferred upon him by a valid statute (*Gnerich* v. *Rutter*; *Webster* v. *Fall*).

The holdings in each of these cases merely involved an application of the familiar definition of indispensable parties as "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." See, e. g., *Shields* v. *Barrow*, 17 How. 130, 139; *Barney* v. *Baltimore*, 6 Wall. 280, 284–285; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 456–457; *California* v. *Southern Pacific Co.*, 157 U. S. 229, 250; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 236; *Niles-Bement Co.* v. *Iron Moulders Union*, 254 U. S. 77, 80. In none of the cases in question—*Warner Valley*, *Gnerich* and

Fall—could a decree have been entered without affecting the interest of the superior officer. This ended each case, for once it has been established that an indispensable party is absent, the proceeding must be dismissed. *Mallow* v. *Hinde,* 12 Wheat. 193; *Shields* v. *Barrow,* 17 How. 130; Amended Rules 12 (b) (7) and 12 (h), F. R. Civ. P., *supra,* pp. 4–6); and see the Advisory Committee's Notes to these amendments.[12]

It is immaterial that the decree would not be technically binding on the absent indispensable party. *Keegan* v. *Humble Oil & Refining Co.,* 155 F. 2d 971, 973 (C. C. A. 5); *Green* v. *Brophy,* 110 F. 2d 539 (App. D. C.); *Vincent Oil Co.* v. *Gulf Refining Co.,* 195 Fed. 434 (C. C. A. 5). And the fact that a joinder of the absent parties might deprive the court of jurisdiction does not make them any less indispensable. *California* v. *Southern Pacific Co.,* 157 U. S. 229; *Barney* v. *Baltimore,* 6 Wall. 280.

Applying the principles just discussed to the specific facts of an action to enjoin the enforcement of a postal fraud order results, necessarily, in the conclusion that the Postmaster General is an indispensable party to such a proceeding. For although, as in the case at bar, the action is nominally brought against the local postmaster,

[12] While the amended Rules will not go into effect until at least April 2, 1948, we feel justified in relying upon them as peculiarly authoritative expressions of what the law should—and will—be.

the real relief sought is against the action taken by his superior, the Postmaster General, and it is only by virtue of the circumstance that the fraud order is couched in terms which require the local postmaster to take action that there is any basis for even attempting to enjoin him. The postal fraud statutes authorize the Postmaster General, not a local postmaster such as the respondent here, to issue fraud orders, and require that the evidence upon which such orders are grounded be satisfactory to him and not to a local postmaster. Local postmasters do not participate in the issuance of such orders; they are not consulted; and they are not even necessarily aware of the basis for the Postmaster General's decision. They are informed of the fraud order only after it is issued and at that time they are instructed to put these orders into effect as agents of the Postmaster General. They must abide by these directions, and they are without discretion as to whether or not to obey the order. Their duties in respect of compliance with such an order are quite as ministerial as those of the postal clerks who actually stamp "Fraudulent" on the individual pieces of mail.[13] Moreover, as compared to *Gnerich* v.

[13] It may be significant in this connection that in *Jarvis* v. *Shackelton Inhaler Co.*, 136 F. 2d 116, *supra*, pp. 33–34, which is one of the leading cases that permits the action to be maintained in the absence of the Postmaster General, it appeared that the local postmaster was using the very product in respect of which his superior, the Postmaster General, had issued the fraud order. R. 81, 83, No. 9276, C. C. A. 6.

Rutter, the postal fraud order cases are much stronger for the application of the indispensable party rule. *Genrich* v. *Rutter* held that the bill could not be maintained in the absence of the Commissioner of Internal Revenue, although there the Commissioner had retained only responsibility and direction over the issuance of the liquor permits and had delegated authority and discretion to issue and sign liquor permits to subordinates, and the bill attacked a condition imposed in a license by the subordinate allegedly beyond the authority vested in him by the regulations. Here, on the other hand, as in all the postal fraud order cases, the local postmaster's functions are purely ministerial, and no authority or discretion is ever delegated to him.

(2) *Attempted reconciliations of the* Colorado *v.* Toll *departure.*

We have already canvassed at some length, *supra,* pp. 26–33, the impact of *Colorado* v. *Toll* upon the present question, the uncertainty which that decision engendered, and the attempts in the several circuits at reconciliation and rationalization. We now propose to consider the various grounds on which the *Toll* case has been distinguished, and the application of those distinctions to postal fraud order cases.

a. The Second Circuit suggested one distinction in its *Lotteries* case, 85 F. 2d 66, viz., that *Colorado* v. *Toll* involved the quasi-sovereign

rights of a State. This distinction is supported by the language of Mr. Justice Holmes in the *Toll* case, and by his citation of *Missouri* v. *Holland*, 252 U. S. 416, which was also a suit by a State. But *Missouri* v. *Holland*, though it was brought against a subordinate, did not touch the question of indispensable parties; it is, therefore, simply a case where that question lurked in the record, and consequently could not in its present aspect survive *Webster* v. *Fall*.[14] In any event, whether the plaintiff is a State or an individual is not a circumstance which would seem to be relevant in determining whom he or it must join as a defendant, or in deciding whether and under what conditions the superior officer is an indispensable party. And even if there were substance in the distinction—which we do not believe—then, since the plaintiff in postal fraud order cases is invariably an individual, *Colorado* v. *Toll* does not apply to such cases. From this it necessarily follows that the Postmaster General is an indispensable party here.[15]

b. A number of district courts have suggested that whether or not the superior is an indispensable party turns on the extent of the authority and discretion vested in the subordinate,

[14] We have already noted the inappositeness of the other authority cited in the *Toll* case; see note 5, *supra*, p. 25; compare pp. 42–46, *infra*.

[15] If the plaintiff's being a State is material, that circumstance would permit an original action to be brought in this Court—i. e., also in the District of Columbia.

and have held that joinder is necessary where the subordinate acts ministerially, on the view that then his acts are in fact those of his superior (*supra*, pp. 32–33). If this distinction is valid, then unquestionably the Postmaster General is an indispensable party to an action to enjoin a fraud order. *Ernest* v. *Fleissner*, 38 F. Supp. 326 (E. D. Wis.); *Scientific Mfg. Co.* v. *Walker*, 40 F. Supp. 465 (M. D. Pa.); *Wheeler* v. *Farley*, 7 F. Supp. 433 (S. D. Cal.), appeal dismissed, 293 U. S. 526.

c. The rule in the Ninth Circuit—the court below—is that the superior is an indispensable party when the exercise of his discretion is attacked, but not when a total lack of statutory authority is alleged. *Neher* v. *Harwood*, 128 F. 2d 846, certiorari denied, 317 U. S. 659, *supra*, pp. 28–29. There are several difficulties in the way of this view.

The first obstacle is that it rests on a misreading of the authorities; the Ninth Circuit in the *Neher* case erroneously interpreted *Webster* v. *Fall* as not involving an attack on the constitutionality of the statute, whereas in fact it did. Compare 128 F. 2d at 849 with 266 U. S. at 509. This circumstance is fatal to theoretical consistency between the *Fall* and *Toll* cases on the Ninth Circuit's attempted reconciliation.

A more practical difficulty with the Ninth Circuit's rule in the present connection is that the line between an assertion of lack of authority

and one of abuse of discretion under admitted authority is not easy to draw, as petitioner's brief indicates. If ever there was a situation where all statutory authority was reposed in one named officer, it is this one; only the Postmaster General is authorized to issue a fraud order, and then only "upon evidence satisfactory to him" (R. S. 3929, 4041, *supra*, pp. 2–4). It is for this reason that in many fraud order cases the Postmaster General is held to be an indispensable party. *Neher* v. *Harwood, supra; Dolphin* v. *Starr,* 130 F. 2d 868 (C. C. A. 9); *Acret* v. *Harwood,* 41 F. Supp. 492 (S. D. Cal.); *Gargilis* v. *Gleavy,* 45 F. Supp. 721 (D. Mass.); cf. *Barr* v. *Rhodes,* 35 F. Supp. 223 (W. D. Ky.). The assertion of arbitrariness or error in arriving at the conclusion is held not to be a challenge of the foundation of the authority, but to assail merely the manner of its exercise. *Acret* v. *Harwood,* 41 F. Supp. 492 (S. D. Cal.).

Yet petitioner attacks the Postmaster General's authority on the ground that he relied on opinion evidence, contrary to the substantive rule said to be laid down in *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94 (Pet. Br. 8–10)—and this in a case where the testimony in question was that of a medical expert as to the causes of obesity, a subject on which there is very little division in scientific opinion (R. 135). We pointed out in our Brief in Opposition in this case, pp. 16–20, why the opinion testimony of the medical expert, based as it was upon accepted

scientific facts, was not the type of opinion evidence condemned in the *McAnnulty* case (cf. *Leach* v. *Carlile*, 258 U. S. 138), and was sufficient to support the fraud order here involved. We do not repeat that argument here in view of the limited scope of the present writ of certiorari; but we mention the point by way of illustrating the practical unworkability of the attempted distinction between "lack of authority" and "abuse of discretion" as a touchstone for determining whether the superior is an indispensable party. That attempt in effect makes the question of parties turn on the final decision on the merits, and, as petitioner's argument here shows, ultimately bogs down in verbalisms.[16]

d. Although, as we have pointed out, the Ninth Circuit's distinction cannot be sustained on the basis of its reading of the cases, it finds support by analogy to the familiar line of cases which hold that where a government official has allegedly exceeded his statutory authority and is trespassing on plaintiff's property, a proceeding against him to enjoin such conduct is not a suit against the United States and the United States is not an indispensable party thereto. See, e. g., *United States* v. *Lee*, 106 U. S. 196; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Ickes* v. *Fox*, 300 U. S.

[16] For a similar yielding to verbalism, see *Pinkus* v. *Walker*, 61 F. Supp. 619 (D. N. J.), opinion modified *sub nom. Pinkus* v. *Reilly*, 71 F. Supp. 993, cited at Pet. 4, 6, 19, 42, 47. That case has been appealed.

82; cf. *Land* v. *Dollar*, 330 U. S. 731. As applied to the present situation, the argument would be that in those circumstances the superior officer is no more an indispensable party in a suit against a subordinate than is the United States. This distinction gains support from the circumstance that *Philadelphia Co.* v. *Stimson*, one of the leading cases on the suits-against-the-United-States point, was cited in *Colorado* v. *Toll* as authority on the indispensable party question, to which it otherwise has no relevance; and this line of distinction has in fact been accepted by numerous of the lower courts. *Eastman* v. *United States*, 28 F. Supp. 807 (W. D. Wash.); *Redlands Foothill Groves* v. *Jacobs*, 30 F. Supp. 995, 1008–1009 (S. D. Cal.); *Oklahoma* v. *Guy F. Atkinson Co.*, 37 F. Supp. 93 (E. D. Okla.), affirmed on another ground, 313 U. S. 508; *Gargilis* v. *Gleavy*, 45 F. Supp. 721 (D. Mass.); *Brotherhood and Union, Etc.* v. *Madden*, 58 F. Supp. 366, 373–374 (D. Md.), reversed on another ground, 147 F. 2d 439 (C. C. A. 4); *Grimes Packing Co.* v. *Hynes*, 67 F. Supp. 43 (D. Alaska); cf. *Varney* v. *Warehime*, 147 F. 2d 238 (C. C. A. 6), certiorari denied, 325 U. S. 882; see 158 A. L. R. 1126, 1127.

The analogy is not complete, since the result of holding the United States to be an indispensable party frequently will be that the plaintiff has only such remedies as the Tucker Act and the Federal Tort Claims Act may afford, whereas to hold that

the superior officer is an indispensable party does not affect the nature or extent of the remedy but only requires that it be sought in the District of Columbia. The real objection, however, to the suits-against-the-United-States analogy, is a more fundamental one, viz., that this would bring into the indispensable party question all of the uncertainty which now surrounds the suits-against-the-United-States point. In a word, this solution is no solution at all, but a remedy at least as bad as the ill which it seeks to cure.

(1) *United States* v. *Lee*, 106 U. S. 196, was a decision at October Term, 1882 (and hence prior to the Tucker Act), over the strong dissent of Mr. Justice Gray, with whom concurred Waite, C. J., and Bradley and Woods, JJ. Yet, at the very next Term, when the question arose again, the writer of the *Lee* opinion admitted that "the questions raised have rarely been free from difficulty," and that it is not "an easy matter to reconcile all the decisions of the court in this class of cases." *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 451, *per* Miller, J. In 1941 the Court commented on that remark in *Brooks* v. *Dewar*, 313 U. S. 354, 359, saying, "The statement applies with equal force at this day"; it there declined to "attempt a critique of the authorities." And only this year the Court again had occasion to consider the decisions, after which it said that

"as a matter of logic it is not easy to reconcile all of them." *Land* v. *Dollar*, 330 U. S. 731, 738.

(ii) The extent of the existing confusion as to when and whether a suit is one against the United States is perhaps most dramatically illustrated by a comparison of two cases involving water rights on reclamation projects.

In *Ide* v. *United States*, 263 U. S. 497, this Court held that the United States, as *plaintiff*, had a sufficient property interest in the waters of the Shoshone River impounded in the Shoshone Project in the State of Wyoming to recapture seepage from project irrigation and to enjoin threatened interferences with such recapture. In *Ickes* v. *Fox*, 300 U. S. 82, this Court held that the United States did not have a sufficient property interest in the waters of the Yakima River impounded in the Sunnyside Project in the State of Washington to be an indispensable party *defendant* to a suit brought against the Secretary of the Interior to force delivery of additional water from the project under certain contracts. Obviously, if the United States has a sufficient property interest in the water to maintain a suit to enjoin a diversion of water it has a sufficient property interest to be a party to a suit seeking to compel a diversion of some of the same kind of water under an alleged contract right—and of course it has never been suggested that there

should be one rule of law for the Shoshone and another for the Yakima.

We are not suggesting here, at this juncture, a reexamination of the suits-against-the-United-States doctrine. We are urging, however, that that doctrine be not imported into the indispensable party question.

e. At least one circuit court of appeals has made the question of the Postmaster General's indispensability or otherwise turn on the form of the relief sought; in *Rood* v. *Goodman*, 83 F. 2d 28, the Fifth Circuit held that since the suit there was one to enjoin the local postmaster from seizing plaintiff's mail and from preventing its delivery, and not brought to set aside the fraud order (83 F. 2d at 31), the Postmaster General was not required to be joined as a party.

It seems reasonably clear that such a distinction is not helpful—particularly in the instant case, where the plaintiff seeks both kinds of relief (R. 269–270). In substance, of course, there is no difference between setting aside a fraud order on the ground that it is invalid, and enjoining enforcement thereof on the same ground. In either event it is the act of the Postmaster General which is drawn in question.[17]

[17] It may well be that the source of the Fifth Circuit's confusion was its reliance (83 F. 2d at 31) on *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, and on *Public Clearing House* v. *Coyne*, 194 U. S. 497, both of which had been declared inapplicable precedents in *Webster* v. *Fall*.

By the same token, it would be unprofitable to attempt a classification of the decisions on the basis of whether affirmative or negative relief was sought. In the present situation any such distinction would break down over the formalism of whether the prayer should be that the local postmaster be required to deliver the mail or forbidden to interfere with or prevent its delivery. Granting the relief couched in negative terms automatically results in affirmative delivery of mail being resumed. Moreover, while the *Warner Valley* and *Fall* cases involved prayers for affirmative relief, the plaintiff in *Gnerich* v. *Rutter* prayed for negative relief; the distinction finds no support there. And finally, this Court having concluded that any distinction between "negative" and "affirmative" served no useful purpose in one field of administrative law (*Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 143), there seems no valid reason why a distinction equally "unilluminating and mischief-making" (307 U. S. at 142) should now be resurrected to plague another aspect of judicial review.

f. Finally there are intimations in some of the discussions on the subject that the indispensability of the superior can be easily ascertained simply by asking whether the complaint asks relief which can be secured through compulsion of the subordinate alone, or—otherwise put—whether the

subordinate had authority or capacity to grant the relief prayed for.[18]

Whether these questions are determinative of the ultimate problem, depends, it is submitted, on how they are interpreted.

The local postmaster has the power to deliver mail and thus to give the plaintiff what he desires. But local postmasters are merely agents and subordinates of the Postmaster General. "They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given opportunity to defend his direction and regulations." *Gnerich* v. *Rutter*, 265 U. S. 388, 391–392. This quotation, the heart of the opinion in the *Gnerich* case, supplies what we conceive to be the answer.

If the subordinate has full authority to afford relief consistently with any directions given him by his superior, then there is no reason why the superior's presence is indispensable. This would cover all cases where there has been a complete delegation within the sphere of which the plaintiff

[18] Cf. Brief for Petitioner in *Brooks* v. *Dewar*, No. 718, Oct. T. 1940, at pp. 27, 33, 35.

seeks and can be granted relief. On the other hand, if the subordinate could only comply with the plaintiff's demand by violating or disregarding instructions from the superior, then, we submit, the superior is an indispensable party, because "his are the hands which would be tied." This rationale, then, is substantially the same elsewhere formulated on the ministerial vs. discretionary basis, *supra*, pp. 32–33, 39–40.

One other thought seems pertinent here with reference to the scope of relief in postal fraud order cases. If the plaintiff is permitted to sue a local postmaster, he gets relief at his residence; but if he moves to another place, there to continue his scheme, the Postmaster General's order can be enforced there regardless of the first injunction. If, however, the Postmaster General is made a party to the first proceeding and his order is held invalid, then the plaintiff is free of postal restraint wherever he may carry on the particular business or scheme in respect of which the order was issued.

(3) *Infirmities of the balance of convenience doctrine*

It remains only to consider the balance of convenience doctrine formulated by the Sixth Circuit, a doctrine which, unlike all of the others, involves no attempt to reconcile *Colorado* v. *Toll* with the other cases on indispensable parties decided by this Court.

We think that, for a number of reasons, the Sixth Circuit's rule cannot be supported.

a. The rule that relief cannot be granted in the absence of an indispensable party is not one of a technical character, but rests on "the plainest principle of justice." *Mallow* v. *Hinde*, 12 Wheat. 193, 198; *Edison Co.* v. *Labor Board*, 305 U. S. 197, 233. It is not a mere rule of equity, which despite the fulfillment of the conditions for its application may, because of the circumstances of the particular case, be waived in the court's discretion. *Mallow* v. *Hinde*, 12 Wheat. 193; *Shields* v. *Barrow*, 17 How. 130. Although originally not based on jurisdictional grounds, the rule has jurisdictional aspects, so that failure to point out the absence of an indispensable party *in limine* does not waive the infirmity and the court itself may raise it *sua sponte*. *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235; *Texas* v. *Interstate Commerce Comm.*, 258 U. S. 158, 164; *Alcohol Warehouse Corp.* v. *Canfield*, 11 F. 2d 214, 216 (C. C. A. 2). In *Webster* v. *Fall*, the cause had gone to decree on the merits before the question was raised and in *Gnerich* v. *Rutter* the point was first raised on appeal. Amended Rule 12 (h), F. R. Civ. P., codifies this doctrine by providing that "the defense of failure to join an indispensable party" is not waived by the opposing party's failure to raise the point by motion or in his answer or reply. The addition of the quoted clause

to the Rule was said by the Advisory Committee to be "one of necessity." What the Sixth Circuit's doctrine does in effect, therefore, is to waive an objection which the parties themselves are powerless to waive, on which one of the parties has in fact been strenuously insisting, and which is, at the very least, quasi-jurisdictional. Cf. Rule 19 (b), *supra*, p. 6.

b. We do not believe, therefore, that the question whether a particular party is an indispensable one can properly be determined on considerations of the balance of convenience. But assuming, solely for purposes of argument, that considerations of convenience may be looked to, then we feel bound to point out that such considerations are not, as the Sixth Circuit seemed to feel, uniformly in the direction of permitting the action to proceed locally in the absence of the superior officer. Quite to the contrary, the balance of convenience runs strongly against any relaxation of the traditional rule that holds the superior to be an indispensable party and requires his presence.

The public has an interest in the proper defense of actions such as the one now under consideration. And the public interest is prejudiced by inadequate or uninformed representation of the defendant in an attack on an administrative order or proceeding, regardless whether the officer

concerned acted rightly or wrongly in the particular case.

In point of actual fact, actions to enjoin the enforcement of postal fraud order can be more adequately defended by the Government in the District of Columbia. The differentiating factors—the time element [19] and the lack of contact between the United States Attorney and the Post Office Department and its records if the action is

[19] Actions to restrain enforcement of fraud orders are frequently filed together with application for restraining orders, either *ex parte* or on five days' notice. The circumstance that every United States Attorney defends on directions from the Attorney General (R. S. 362, 5 U. S. C. 317)—actually, of course, from the appropriate division of the Department of Justice—has misled some courts and commentators into believing that there is no difference whether the action is brought in the District of Montana, say, or the District of Columbia. There is a difference in fact because of the time element.

The United States Attorney undertaking to oppose such applications must first forward the complaint to the Department of Justice to serve authorization to defend. Service is also made on the Attorney General pursuant to Rules 4 (d) (4) and 4 (d) (5), F. R. Civ. P., but in practice such service is often belated, and time runs from service on the United States Attorney. Moreover, delay invariably ensues if, as is generally the case, the complaint must be copied for the use of the Post Office Department in the preparation of affidavits in opposition to the application.

If a temporary stay is granted, then the case for all practical purposes is prejudged, and if the stay continues for any length of time it is the United States Attorney, on behalf of the defendant postmaster, who must persuade the court to disturb what has become the *status quo*.

permitted to proceed in the field [20]—affect the quality and effectiveness of the defense.[21] They do not similarly influence the presentation of the plaintiff's case. This Court has not failed in other connections to take notice of the difference between governmental and private litigation, particularly in respect of the time factor. See Rule 12 (a), F. R. Civ. P. (United States or officer or agency thereof has 60 days to answer complaint as against 20 days for private individual); *Virginia* v. *West Virginia*, 222 U. S. 17, 19–20

[20] The present case is unique, or nearly so, in that the transcript of the record before the Post Office Department and the Findings of Fact are attached to the complaint (R. 44–228). Usually the transcript is not attached and the findings only rarely. This means that, in the vast majority of instances, the United States Attorney is under the substantial handicap of having all his evidence in Washington. The Solicitor of the Post Office Department has no regional representatives, and the local postmaster, if not a mere indifferent bystander, cannot help even if so minded—and sometimes, as in *Jarvis* v. *Shackelton Inhaler Co.*, 136 F. 2d 116 (C. C. A. 6), *supra*, p. 37, note 13, he is himself one of the plaintiff's customers.

In the District of Columbia, on the other hand, the United States Attorney is much closer to the Post Office Department and to the Department of Justice; the time-lag is minimized; and the quality and quantum of the defense are substantially aided.

[21] The considerations discussed in the preceding two footnotes are additional to one which is not susceptible of objective proof, viz., the greater familiarity with, and the greater opportunity for acquiring familiarity with, postal matters, which obtains in the District of Columbia in comparison with other judicial districts.

("* * * a State cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed"); cf. Rule 55 (e), F. R. Civ. P. (limitation on default judgment against United States or officer or agency thereof).

And while the disadvantages noted might not be too burdensome in a few cases, the fact of the matter is that, in view of the marked expansion of governmental activity in recent years, the volume of litigation has increased immeasurably. Quite a number of courts have therefore noted that to permit attacks on the actions, orders, or regulations of the numerous government officials charged with the responsibility therefor in district courts elsewhere than in the District of Columbia, would disrupt the regular course of business and "introduce chaos into our governmental system." *Acret* v. *Harwood,* 41 F. Supp. 492, 494 (S. D. Cal.); *Smith* v. *Farley,* 38 F. Supp. 1012, 1014 (S. D. N. Y.); cf. *United States* v. *Shaw,* 309 U. S. 495, 502. Moreover, as pointed out by Judge Learned Hand in *National Conference on Legalizing Lotteries* v. *Goldman,* 85 F. 2d 66, 67 (C. C. A. 2), unless the superior is joined, the subordinate will be under a duty to obey the mandate of the court, and at the same time be subject to the conflicting commands of his superior who is under no legal compulsion to revoke

them. Not only might such litigation dislocate government business, but it makes possible a multiplicity of actions throughout the country which may be so voluminous as to impede, by design or accident, the government's functions. That this is not an imaginary horrible, but a very real danger in connection with regulatory legislation which affects powerful economic elements of the community, is amply demonstrated by *Landis* v. *North American Co.*, 299 U. S. 248.

A plaintiff's presentation is not similarly affected by considerations of time, and he has full and effective contact with counsel before the action is commenced. Cf. *United States* v. *Johnson*, 323 U. S. 273. The only corresponding inconvenience he can show, in consequence of being required to sue the superior, is that he must bring his action in the District of Columbia. That factor may loom larger in the present case, where the plaintiff hails from California, than it would if we were here concerned with a fraud order directed to a postmaster in Virginia or Maryland. In truth, however, inconvenience of this kind is simply an inescapable consequence of the fact that the United States is a large country whose seat of government is localized at one place. Californians who desire to appear before committees of Congress when Congress is in session or who have causes before this Court or the several legislative courts located in the District

of Columbia are similarly incommoded by comparison with Eastern citiens.[22]

Proceedings to enjoin postal fraud orders are readily brought in Washington, D. C.[23] Moreover, and this we deem determinative in the postal fraud order situation, the individual against whom a charge of fraud is made by the Post

[22] Instead of requiring citizens to come to the seat of government, the seat of government could conceivably ride circuit and go to the citizens. Under the Rhode Island Constitution originally adopted, as under the Royal Charter of 1663, the General Assembly met, in turn, at the several county seats. R. I. Const. (1842), Art. IV, Sec. 3. After 1854 and until 1901, it met alternately at Providence and Newport. Art. of Amendment III. Providence did not become the sole capital until 1901. Art. of Amendment XI, Sec. 1.

The Supreme Judicial Court of Massachusetts still sits *en banc* at several places within the Commonwealth. Mass. Gen. Laws (Ter. ed. 1932), c. 211, §§ 12, 13. And under Jud. Code, Sec. 126 (28 U. S. C. 223), five of the ten circuit courts of appeals are itinerant in fact as well as in law; another, the Circuit Court of Appeals for the First Circuit, is empowered to sit at San Juan, P. R., but, so far as we are aware, has never done so.

[23] E. g., *Plapao Laboratories* v. *Farley*, 92 F. 2d 228 (App. D. C.), certiorari denied, 302 U. S. 732; *National Conference on Legalizing Lotteries* v. *Farley*, 96 F. 2d 861 (App. D. C.), certiorari denied, 305 U. S. 624; *Farley* v. *Simmons*, 99 F. 2d 343 (App. D. C.), certiorari denied, 305 U. S. 651; *Farley* v. *Heininger*, 105 F. 2d 79 (App. D. C.), certiorari denied, 308 U. S. 587; *Pike* v. *Walker*, 121 F. 2d 37 (App. D. C.), certiorari denied, 314 U. S. 625; *Consumers Union* v. *Walker*, 145 F. 2d 33 (App. D. C.); *Esquire, Inc.* v. *Walker*, 151 F. 2d 49 (App. D. C.), affirmed *sub nom. Hannegan* v. *Esquire*, 327 U. S. 146; *Cable* v. *Walker*, 158 F. 2d 23 (App. D. C.), certiorari denied, 328 U. S. 860; *Hannegan* v. *Read Magazine*, No. 50, this Term.

Office Department must come to the District of Columbia if he desires to defend at the hearing that precedes the issuance of a fraud order. That Department has no deposition procedure, and no power to subpoena witnesses. See Sen. Doc. 186, 76th Cong., 3d sess., Part 12, *supra*. All this follows from the statutes which lodge sole and exclusive power in respect of postal fraud orders in the Postmaster General. Since, therefore, the individual is required in consequence of the Act of Congress to defend himself in the District of Columbia against issuance of a fraud order by the Postmaster General, it does not seem unreasonable or undul inconvenient to require him to sue the Postmaster General at the same place in any proceeding which attacks the fraud order as invalid. Certainly until Congress sees fit to decentralize the issuance of fraud orders there would seem to be no valid or compelling ground of convenience on which to base decentralization of attacks on the validity of fraud orders.

c. Congress has not provided any applicable exception to the general provision that an action in a federal court that is not based solely upon diversity of citizenship may not be brought against any defendant in a district of which he is not an inhabitant. Judicial Code, Sec. 51, 28 U. S. C. 112. As a result, heads of departments and other superior officials are usually not ame-

nable to service except in the District of Columbia, and hence if the indispensable party requirement be applied, suit may not be maintained elsewhere to review their orders unless they appear voluntarily. The Sixth Circuit by proceeding with the suit despite the absence of the superior official has in effect written its own exception into the Judicial Code.

Congress has, in the case of many agencies and officials charged with the administration of various regulatory statutes, provided that the actions, orders or regulations of these agencies and officials may be reviewed elsewhere than in the District of Columbia. See, *e. g.*, National Labor Relations Act, 29 U. S. C. 160f; Fair Labor Standards Act, 29 U. S. C. 210; Securities Act, 15 U. S. C. 771 (a); Public Utility Holding Company Act, 15 U. S. C. 79x (a); Federal Trade Commission Act, 15 U. S. C. 45c; but see Federal Communications Act, 47 U. S. C. 402b. On the other hand, Congress has laid down the requirement in the Tucker Act (Act of March 3, 1887, c. 359, 24 Stat. 505, 28 U. S. C. 41 (20)) that all claims over $10,000 against the United States and all claims for pay or salary must be filed at the seat of government.[24] This limitation seems to have

[24] Most of the states which have consented to suit have likewise prescribed a forum at the seat of the government. The States of Alabama, Illinois, and Michigan have established a court or board of claims holding its sessions at the capital. Cumulative Supplement to the Code of Alabama,

been based on the fear of dislocation of government business which would attend the granting of blanket permission to sue in federal district courts generally. Cf. *United States* v. *Shaw*, 309 U. S. 495, 502; *Davis* v. *West Virginia Bridge Comm.*, 113 W. Va. 110; *Greene* v. *Wolf*, 175 Ky. 58, 61–62. It might well be that such fear has restrained the Congress from excepting the higher government officials, such as the Postmaster General, from the provisions of Section 51 of the Judicial Code and from authorizing, as in effect the Sixth Circuit does, courts other than those in the District of Columbia to review orders of superior government officials. Where Congress has anticipated a multiplicity of suits in such volume that the statute itself might prove unenforceable, as in the Emergency Price Control

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1940, Title 55, Sec. 333, as amended; Jones, *Illinois Statutes Annotated*, Vol. 27, Sec. 126.057 *et seq.*; Mich. Stats. Ann., Sec. 3.461. Others, including California, Indiana, Massachusetts, Mississippi, Nebraska, Virginia, Washington, and Wisconsin, have consented to be sued in a court of ordinary jurisdiction but have either expressly limited jurisdiction to the court of the county in which the seat of the government is located, or authorized a change of venue to that county on motion of the Attorney General. Deering, *Political Code of California*, 1937, Sec. 688; Burns, *Indiana Statutes Annotated*, 1933, Sec. 4–1501; Annotated Laws of Massachusetts, 1933, Vol. 9, c. 258, Sec. 1; Mississippi Code of 1942, Sec. 4387; Revised Statutes of Nebraska, 1942, 24–324; Virginia Code of 1930, Sec. 2578; Remington, *Revised Statutes of Washington Annotated*, 1932, Title 6, c. 4, Sec. 886; Wisconsin Statutes (1945) 261.01.

Act, it has narrowed the scope and manner of judicial review accordingly. See *Yakus* v. *United States*, 321 U. S. 414. In the absence of Congressional action, either permitting review of orders and regulations elsewhere than at the seat of government, or narrowing the kinds of proceedings which may be brought, we submit that it was not for the Sixth Circuit, by introducing concepts of convenience which Congress had not seen fit to write into the postal statutes, to permit a fraud order issued by the Postmaster General's to be set aside in his absence.

C. PROJECT FOR A WORKABLE SOLUTION

If we were here concerned simply with the resolution of the particular case before the Court, the application of the several groups of decisions discussed would require affirmance of the judgment below. For under all or nearly all of the formulas evolved for reconciling *Colorado* v. *Toll* with the *Warner Valley-Gnerich-Fall* line, the Postmaster General would be an indispensable party to proceedings to enjoin the enforcement of postal fraud orders.

He would be on the interpretation of *Colorado* v. *Toll* as applying only to suits by States, *supra*, pp. 38–39, for petitioners here are individuals. He would be under the rule that the superior is an indispensable party where the subordinate has acted ministerially only and has not deviated from

the terms of the superior's commands," *supra*, pp. 39–40, for assuredly respondent here has obeyed to the letter the direction he received from the Postmaster General. He would be under the Ninth Circuit's distinction between an attack on a statute or a contention of lack of statutory authority as distinguished from a complaint going to the exercise of admitted authority, *supra*, pp. 40–42, because the amended complaint here does not assail the statute, the Postmaster General is the only officer empowered by law to issue a fraud order, the statute says it may issue "upon evidence satisfactory to him," and the only substantive question is whether the evidence which was in fact satisfactory to him is in law sufficient to sustain the order. And the Postmaster General would also, we submit, be an indispensable party if such a question can properly be determined upon considerations of convenience; for the balance of convenience, giving due weight to the public interests involved and to the centralized statutory scheme provided by Congress for the issuance of fraud orders, favors the conclusion that since such orders can only be issued by the Postmaster General, they should not be set aside nor their enforcement enjoined except in a proceeding to which the Postmaster General is a party.

But while these views would dispose of the present case, they would not settle or resolve what is

one of the most uncertain situations in current administrative law.

As the discussion and analysis of the decisions above demonstrate, there is no way, if the cases are accurately read, to reconcile the *Warner Valley, Gnerich,* and *Fall* cases with the decision in *Colorado* v. *Toll.* The fact of the matter is that the two lines of authority are irreconcilable, and that one or the other must give way.

As we have already pointed out in some detail, the *Warner Valley-Gnerich-Fall* line of cases is consistent with accepted equitable rules of who is and who is not an indispensable party. The disposition made of those particular controversies is consistent with the principles of the Federal Rules of Civil Procedure. The *ratio decidendi* of those cases conforms to that of the numberless other decisions dealing with who are indispensable parties in suits brought against private defendants not holding public office.

Colorado v. *Toll,* on the other hand, rests, we respectfully submit, on the citation of inapplicable authorities, and is inconsistent with normal and settled equitable principles. It is inconsistent with the Federal Rules of Civil Procedure, and does not conform to the standard laid down in private law cases for determining who is and who is not an indispensable party to actions seeking injunctions against nongovernmental individuals.

We think that there is no sound basis for laying down one rule of indispensability in an action against a private corporation and its agents or subsidiaries and another for an action against a public officer and his agents or employees. The very premise of permitting a public officer to be sued is that he must answer as an individual for excess or abuse of official action; he is not above the law, he will be dealt with as any other person. Conversely, therefore, he should be answerable on an equal footing with respect to opportunity to defend—which is a matter of substance and not merely an equalizing of the time-lag attributable to the often ponderous creaking of the machinery of government. It is not logical, nor is it right, to apply to him a different rule as to notice and hearing, and to hold that his acts, his orders, his determinations, may be set aside in his absence.

We believe, therefore, that the true rule is that an action seeking equitable relief can proceed in the absence of the superior only when the subordinate's authority, under a statute and within the order given by his superior, is sufficient to grant the relief sought. Where, however, all power and all discretion are vested in the superior, where the order or decision attacked has been made by the superior, then he is an indispensable party, and relief cannot be granted in his absence.

Such a rule is consistent with accepted principles. It is workable. It does not break down in verbalisms or scholastic distinctions. And it relieves the lower courts of the burdensome legal acrobatics to which they have been profitlessly subjected these last twenty years or so. True, the formulation of the proposed rule would involve the demise of *Colorado* v. *Toll,* 268 U. S. 228, but as that case represents a departure from established principles, it cannot be deemed guiding or controlling. It should now "be allowed a deserved repose." *Adkins* v. *Children's Hospital,* 261 U. S. 525, 570, *per* Holmes, J., dissenting. This Court has not heretofore hesitated to overrule a decision on a point of procedure which was similarly "a departure", "a source of embarrassment and confusion in other courts", and which "on further consideration we feel constrained to pronounce * * * essentially unsound." *Lee* v. *Chesapeake & Ohio Ry.,* 260 U. S. 653, 659, 660, overruling *Ex parte Wisner,* 203 U. S. 449, and qualifying *In re Moore,* 209 U. S. 490.

Litigants and courts alike will profit from the resultant certainty, and Congress will still be free to provide for decentralized review of administrative orders whenever it considers that the public interest would thereby be advanced.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1947.

Al Williams and Al Williams Health System of Los Angeles, Inc., Petitioners, v. Michael J. Fanning, Individually and as Postmaster of the City of Los Angeles, California.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 8, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

This case, here on certiorari to resolve a conflict between the circuits,[1] presents the question whether those against whom the Postmaster General has issued a postal fraud order may sue the local postmaster to enjoin him from carrying out the order or whether the Postmaster General is an indispensable party.

The Postmaster General, after a hearing in Washington, D. C., found that petitioners' weight-reducing enterprise was fraudulent. He accordingly issued a fraud order (R. S. §§ 3929, 4041, 39 U. S. C. §§ 259, 732) directing respondent, postmaster at Los Angeles, California (where petitioners do business) to refuse payment of any money order drawn to the order of petitioners, to advise the remitter of such money order that payment had been forbidden, and to stamp "fraudulent" on all mail matter directed to petitioners and to return it to the senders.

[1] The Circuit Court of Appeals in the instant case followed its earlier decisions holding that the Postmaster General was an indispensable party. *Neher* v. *Harwood*, 128 F. 2d 846; *Dolphin* v. *Starr*, 130 F. 2d 868. Accord: *National Conference* v. *Goldman*, 85 F. 2d 66 (Second Circuit). Contra: *Jarvis* v. *Shackleton*, 136 F. 2d 116 (Sixth Circuit). For collection and review of the cases see 158 A. L. R. 1126.

Petitioners thereupon brought this suit in the District Court for the Southern District of California to enjoin respondent from carrying out the order,[2] claiming that they had been deprived of the hearing to which they were entitled and that the fraud order was without the support of substantial evidence. On motion of respondent the District Court dismissed the complaint, holding in accord with the view of the Ninth Circuit Court of Appeals[3] that the Postmaster General was an indispensable party. The Circuit Court of Appeals affirmed. 158 F. 2d 95.

It was long assumed that the Postmaster General was not an indispensable party in these fraud order cases. Beginning at least with *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, decided in 1902, the maintenance of the suit against the local postmaster alone was not challenged.[4]

Meanwhile, another line of cases was emerging. *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, held that a suit against the Secretary of the Interior to compel him to issue patents to public lands abated on his resignation. As the purpose of the bill was "to control the action of the Secretary of the Interior" (165 U. S. p. 34), he was held to be an indispensable party. Next came *Gnerich* v. *Rutter*, 265 U. S. 388, which was a suit to enjoin a representative of the Commissioner of Internal Revenue from enforcing a restriction embodied in a permit issued under the National Prohibition Act. The subordinate official, acting for the Commissioner, had refused to give plaintiffs the more liberal permit which they desired; and he had no power to grant the desired permit without revision of his delegated authority. The Commissioner was held

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[2] Jurisdiction was invoked under § 24 (6) of the Judicial Code, 28 U. S. C. § 41 (6).

[3] See note 1, *supra*.

[4] And see *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Leach* v. *Carlile*, 258 U. S. 138.

to be an indispensable party. *Webster* v. *Fall*, 266 U. S. 507, followed. That was a suit brought by an Osage Indian to require payment to him of funds under an act of Congress. The power and responsibility of making the payments being in the Secretary of the Interior, he was held to be an indispensable party.

These cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him.

That principle was brought into clearer relief by *Colorado* v. *Toll*, 268 U. S. 228. There the director of national parks had issued regulations forbidding operation in the Rocky Mountain National Park of automobiles for hire. Toll was the superintendent of the park who was enforcing the regulation. A suit to enjoin him was allowed to be maintained without joining his superior, the director, who had promulgated the regulation. That result followed, 268 U. S. p. 230, by analogy to those cases which permit suit against a public official who invades a private right either by exceeding his authority or by carrying out a mandate of his superior. *United States* v. *Lee*, 106 U. S. 196; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619, 620. In those situations relief against the offending officer could be granted without risk that the judgment awarded would "expend itself on the public treasury or domain, or interfere with the public administration." *Land* v. *Dollar*, 330 U. S. 731, 738.

But the distinction we have noted between these two lines of cases apparently was not as clear to others as it seems to us. For a conflict among the circuits developed in these postal fraud cases.[5] *National Conference* v. *Goldman*, 85 F. 2d 66, which held that the Postmaster

[5] See note 1, *supra*.

General must be made a party, suggested that if he were not, the local postmaster would be left under a command of his superior to do what the court has forbidden. But that seems to us immaterial if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court. It seems plain in the present case that that will be the result even though the local postmaster alone is sued. It is he who refuses to pay money orders, who places the stamp "fraudulent" on the mail, who returns the mail to the senders. If he desists in those acts, the matter is at an end. That is all the relief which petitioners seek. The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutter* case. No concurrence on his part is necessary to make lawful the payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command.

Reversed.

THE CHIEF JUSTICE and MR. JUSTICE BURTON dissent.